149 U.S. 43

RECORD, CASE No. 13,794.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 200.

THE RICHMOND & DANVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MAGGIE L. POWERS, HOMER W. POWERS, AND LULA W. POWERS, BY THEIR NEXT FRIEND AND GUARDIAN AD LITEM, C. F. REED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 17, 1889.

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1 *Record.*

C. F. REED, Next Friend of Maggie L. Powers, Homer W. Powers, and Lula W. Powers,
vs.
THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Action for damages.

City Court of Atlanta, Georgia.

Removed to U. S. circuit court for the northern district of Ga.

Be it remembered that on the 7th day of February, 1887, there was filed in the clerk's office of the United States circuit court in and for the northern district of Georgia the record in the above-stated case, removed from the city court of Atlanta, Georgia, in words and figures following, to wit:

2 *Declaration.*

GEORGIA.
Fulton County.

To the city court of Atlanta:

The petition of Mrs. S. E. Powers shows that the Richmond and Danville Railroad Company, a corporation of said county, controlling and having possession of and operating the road-bed of the Atlanta and Charlotte Air Line Railway Company, in said county, the latter corporation being a corporation with its principal office in said county, has damaged her in the sum of fifteen thousand ($15,000.00) dollars by reason of the following facts:

W. D. Powers was the husband of your petitioner. On the 11th day of April, 1886, he was a passenger of the R. & D. R. R. Co. When he reached Lula, a station upon said road, he undertook to make his way from the car in which he had been carried to Lula to the hotel. To do this it was necessary for him to cross another track of said company. It was night, and no sufficient light had been provided by said company. While making his way in the accustomed route provided by the defendant, and the only route provided by the defendant, from his train towards the hotel he was run over and killed by another train of the defendant, which ran upon him and killed him without ringing the bell, without blowing the whistle, without giving notice of any kind of its approach, and which was running at an unusual and dangerous rate of speed into the place provided for the passengers and over the place provided
3 for passengers to cross and at a time when many passengers were accustomed to occupy the place into which said train ran.

Defendant was negligent for running its train in the manner in which it was run at said place and time and for failing to provide a

under your hands and seals, to our said court, to be held on the first Monday in December, 1886, together with this writ.

Witness the Honorable Howard Van Epps, judge of our said court, this 24 day of November, 1886.

C. H. STRONG, *Clerk.*

7 *Answer to Interrogatories.*

MAGGIE L. POWERS *et al.*, by Next Friend, *vs.* THE RICHMOND & DANVILLE RAILROAD COMPANY. } City Court, June Term, 1886.

STATE OF GEORGIA, *Habersham County.*

By virtue of a commission to us directed from the city court of Atlanta, Fulton county, Georgia, we have caused G. W. Edwards, the person in said commission named, to come before us, who, being duly sworn true answers to make to certain interrogatories thereto annexed, deposes and answers as follows:

To the 1st direct interrogatory he answers: Toccoa, Georgia; merchant.

To the 2nd direct Intg- he answers: I was present at Lula, Georgia, on the night of April 11, 1886, when W. D. Powers was killed. I came down to the crossing after eating supper and stopped and spoke to Capt. Landrum, with my back to the engine; while I was talking with him heard some one say, "Look out; you will get run over," and I turned to see and saw the pilot of the engine knock a man down; it pushed him along about 20 or 30 feet and then threw him off between the two tracks, where he laid till he was taken up.

To the 3rd interrogatory he answers: I did hear some one
8 call to him to look out and saw the man that called out. I did not know his name then, but he was pointed out to me as Haden Coe.

To the 4th interrogative he answers: The head-light on the engine was burning; there was also a good torch-light fire burning between the railroad and the eating-house. If the engine gave any signals I don't know, as I was not paying any attention at the time.

G. W. EDWARDS.

Answered, sworn to, & subscribed before us this 3 December, 1886.

EDWARD SCHAEFER, [SEAL.] [L. S.] *Commissioner.*

T. B. RAINEY, [SEAL.] [L. S.] *Commissioner.*

Endorsements on envelope.

Rec'd this package of interrogatories from Edward Schaefer, one of the commissioners, and forwarded by due course of mail. Toccoa, Ga., Dec. 6, 1886.

JAS. M. FREEMAN, *P. M.*

Received at Atlanta, Ga., Dec. 7, 1886, by due course of mail.
J. W. RENFROE, *P. M.*

Received this package from the hands of A. P. Woodward, dep. P. M., upon usual oath, with leave to open, this 11 December, 1886.
J. S. HOLLIDAY, *D. C.*

9 *Interrogatories of Chas. O. Heming.*

City Court of Atlanta.

MAGGIE L. POWERS *et al.*, by Next Friend,
vs.
R. & D. R. R. Co.
} Damages.

Interrogatories to be propounded to Charles O. Heming, a resident of Baltimore, Md.

1 Int'y. Where were you on the 11 of April, 1886?

2 Int'y. If you state that you were at Lula, Ga., at the time the north-bound train from Atlanta stopped for supper state whether or not you saw any one injured at or near that place. If so, how was he injured? If you state that you saw the south-bound train run over Mr. Powers state what signals the south-bound train was giving at the time and before it struck Mr. Powers and — far the train ran after striking him.

3 Int'y. State anything further that you may know that will benefit the plaintiff.

HOKE & BURTON SMITH,
Pl'ffs' Att'ys.

Cross-Interrogatories.

1. Where do you reside, and in what business are you engaged? What is your age?

2. Was not the head-light burning on the engine, and was there not a large torch or light burning on the premises?

3. Did you not hear the bell ringing? Were you specially listening for a bell? Did you not hear some one call to him to look out?

4. State exactly where you were all the time.

HOPKINS & GLENN,
Def't's Att'ys.

10 *Service.*

Service acknowledged, copy waived, &c., Oct. 13, 1886. They may be extended at Macon, and we nominate Hill & Harris as commissioners.

HOPKINS & GLENN,
Def't's Att'ys.

11 *Commission for Interrogatories.*

STATE OF GEORGIA, }
Fulton County. }

By his honor Howard Van Epps, judge of the city court of Atlanta for the county and State aforesaid.

To Robert Hodges, Walter B. Hill:

Whereas there is a certain matter in controversy now depending in the city court of Atlanta for said county between Maggie L. Powers *et al.*, by next friend, and the Richmond & Danville Railroad Company;

And whereas Charles D. Hening is a material witness in said suit and cannot attend our said court in person without manifest inconvenience:

Now know ye that we, reposing special trust and confidence in your prudence and fidelity, have appointed you and you or any two more of you are hereby authorized and required to cause the said witness personally to come before you and, after being duly sworn, to examine him concerning the said suit agreeably to the interrogatories hereunto annexed; and the answers to the same being plainly and distinctly written, you are to send the same, closed up under your hands and seals, to our said court, now in session, together with this writ.

Witness the Honorable Howard Van Epps, judge of our said court, this 22nd day of November, 1886.

C. H. STRONG, *Clerk.*

Instructions to Guide in Taking Testimony.

First. Fill the blank in the commission with the names of the persons officiating as commissioners. (Two may act. Less than two will not suffice.)

Second. Take a separate sheet of paper, state the case precisely as it is at the head of the interrogatories, then write the following formula:

STATE OF ——, }
County of ——. }

By virtue of a commission from the honorable the superior court of —— county to us directed, we have caused (insert the name of witness or witnesses) the witness in said commission named to come before us, *and*, being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

To the first interrogatory he answers (and so with the rest of the answers). When all are answered let the witness subscribe them.

Then the commissioners will observe the following form at the end of the answers:

Answered, sworn to, and subscribed before us this — day of ——, 18—.

—— ——, [L. S.]
Commissioner.
—— ——, [L. S.]
Commissioner.

Then annex the answers to the interrogatories with a wafer, seal all up in one packet, put as many seals on the envelopes as there are commissioners, let each commissioner write his name across the seal, adding the word "commissioner." Direct the package: "To the clerk of —— court of —— county, Georgia." If the packet is to be sent by mail, let the postmaster certify as follows: "Received this packet from —— ——, Esq., one of the commissioners. —— ——, postmaster at ——."

State the case on the outside of the envelope, just as it is in the caption of the interrogatories.

NOTE.—1. No party or his counsel or agent or other person in his behalf can be present at the execution of the commission.

2. No person who would be incompetent as a juror on account of relationship, and no attorney of either of the parties, clerk, or agent paid to discharge this duty, can be a competent commissioner.

3. Witnesses may write out their answers only in presence of the commissioners and by their consent, and in no other way.

4. All written memoranda that a witness answers from must be sent with the commission and the fact certified by the commissioners.

12 *Answers to Interrogatories.*

STATE OF GEORGIA,
County of Bibb.

MAGGIE L. POWERS *et al.*, by Next Friend,
vs.
THE RICHMOND & DANVILLE RAILROAD COMPANY.

By virtue of a commission from the honorable the city court of Atlanta, Fulton county, to us directed, we have caused Chas. D. Hening, the witness in said commission named, to come before us, *and* being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

To the 1st interrogatory he answers: I was on the south-bound train on R. & D. R. R. from Charlotte to Atlanta.

To the 2nd interrogatory he answers: I saw a party killed by the south-bound train at Lula, Ga., on the night of the 11th of April, 1886. When the south-bound train struck Mr. Powers it was giving

no signals for warning that it was coming up from the water tank to take on passengers. I do not know how far the train ran after it struck Mr. Powers, as I paid no attention to the train after I heard Powers scream.

To the 3rd interrogatory he answers: Powers walked across the track with his back to the approaching engine and there was no signal to attract his attention.

13 *Cross-Interrogatories.*

To the first cross-interrogatory he answers: I reside in Macon; engaged in the retail dry-goods business; I am 28 years of age.

To the 2 cross-interrogatory he answers: I don't know whether the head-light was burning on the engine or not, but think it was. There was a large light or torch burning on the premises in front of the hotel.

To the 3rd cross-interrogatory he answers: I did not hear the bell ringing. I was not specially listening for a bell, but if it had have been ringing I would have heard it. I did not hear any call to Mr. Powers to look out.

To the 4th cross-interrogatory he answers: I got off of the south-bound train at Lula and went to the hotel for supper, returned from supper to the platform to wait my train—pulling up from the water tank—to get aboard to go to Atlanta. It had backed down to the water tank after it arrived at Lula. The north-bound train pulled up while I was at supper. When I came out from the supper-room the passengers from the north-bound train were passing into supper. Powers was not among these passengers going in to supper, but was on the other side of the track from the hotel. While I was
14 standing on the platform I saw the whole accident as it occurred. I was on the platform long enough to see the engine pull up and see the whole accident.

CHARLES D. HENING.

Answered, sworn to, & subscribed before us this 11 day of January, 1889.

ROBERT HODGES, *Com'r.* [L. S.]
WALTER B. HILL, *Com'r.* [L. S.]

Endorsements on envelope.

Received the within interrogatories from the hands of Robert Hodges, one of the commissioners, this Jan. 11, 1887.

THOMAS HARDMAN, *P. M.*

January 12, 1887.

Received by due course of mail at Atlanta, Ga., P. O. Jan. 12, 1887.

A. P. WOODWARD, *Ass't P. M.*

Received this package from the hands of A. P. Woodward, dep. P. M., in open court, upon the usual oath, with leave to open, this 13 Jan., 1887.

J. S. HOLLIDAY, *D. C.*

Interrogatories of R. H. Munday.

City Court of Atlanta, Ga.

MRS. S. E. POWERS *et al.*
vs.
R. & D. R. R. Co.

Interrogatories to be propounded to R. H. Munday, a material witness for the pl'ff, who resides in Lula, Ga.

Interrogatory 1st. Where do you reside and what is your occupation?

15 Interrogatory 2nd. Were you or not at Lula, Ga., in April last when a man by the name of Powers was said to have been killed by a train on def't's road? Did you see the accident? State fully and particularly all that you saw. How far and in what direction were you from the train when the accident happened? Did you notice the train before it struck the man? What attracted your attention to it? How fast was the train going? How far did it run after it struck him? What signal, if any, did the train give as it started or while it was running up to the time it struck him? Did or not the bell ring or whistle sound?

Int'y 3rd. How many persons were on the — at the time of the accident, if you noticed? How far from the post with "Stop" painted on it (if you saw such a post) was it that the man was struck & in what direction? Did or not the train stop at the post? If not, how far beyond it did it go? Has or not that post been removed? If so, when, how far, and in what direction?

Int'y 4th. State anything further you may know that will benefit the plaintiff.

HOKE & BURTON SMITH,
Att'ys for Pl'ff.

Defendant objects to 3rd int'y as leading & illegal.

HOPKINS & GLENN,
Def't's Att'ys.

16 *Cross-Interrogatories.*

(1.) In what business are you and what — you been doing for the past two years? Where do you live? What is your age and color? To whom have you talked or written about this case and when and where?

HOPKINS & GLENN,
Def't's Att'ys.

Service.

Service acknowledged. Let commission issue.
Jan. 17, 1887.

HOPKINS & GLENN,
Def't's Att'ys.

17 *Commission for Interrogatories.*

STATE OF GEORGIA, }
Fulton County. }

By his honor Howard Van Epps, judge of the city court of Atlanta for the county and State aforesaid.

To —— ——:

Whereas there is a certain matter in controversy now depending in the city court of Atlanta for said county between Maggie L. Powers *et al.*, by next friend, and the R. & D. R. R. Company;

And whereas R. H. Munday is a material witness in said suit and cannot attend our said court in person without manifest inconvenience:

Now know ye that we, reposing special trust and confidence in your prudence and fidelity, have appointed you and you or any two more of you are hereby authorized and required to cause the said witness personally to come before you, and, after being duly sworn, to examine him concerning the said suit agreeably to the interrogatories hereunto annexed; and the answers to the same being plainly and distinctly written, you are to send the same, closed up under your hands and seals, to our said court, to be held on the 4th Monday in Jan., 1887, together with this writ.

Witness the Honorable Howard Van Epps, judge of our said court, this 20 day of January, 1887.

C. H. STRONG, *Clerk.*

Instructions to Guide in Taking Testimony.

First. Fill the blank in the commission with the names of the persons officiating as commissioners. (Two may act. Less than two will not suffice.)

Second. Take a separate sheet of paper, state the case precisely as it is at the head of the interrogatories, then write the following formula:

STATE OF ——, }
County of ——. }

By virtue of a commission from the honorable the superior court of —— county to us directed, we have caused (insert the name of witness or witnesses) the witness in said commission named to come before us, *and*, being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

To the first interrogatory he answers (and so with the rest of the answers). When all are answered let the witness subscribe them. Then the commissioners will observe the following form at the end of the answers:

Answered, sworn to, and subscribed before us this — day of ——, 18—.

—— ——, [L. S.]
Commissioner.
—— ——, [L. S.]
Commissioner.

Then annex the answers to the interrogatories with a wafer, seal all up in one packet, put as many seals on the envelopes as there are commissioners, let each commissioner write his name across the seal, adding the word "commissioner." Direct the package: "To the clerk of —— court of —— county, Georgia." If the packet is to be sent by mail, let the postmaster certify as follows: "Received this packet from —— ——, Esq., one of the commissioners. —— ——, postmaster at ——."

State the case on the outside of the envelope, just as it is in the caption of the interrogatories.

NOTE.—1. No party or his counsel or agent or other person in his behalf can be present at the execution of the commission.

2. No person who would be incompetent as a juror on account of relationship, and no attorney of either of the parties, clerk, or agent paid to discharge this duty, can be a competent commissioner.

3. Witnesses may write out their answers only in presence of the commissioners and by their consent, and in no other way.

4. All written memoranda that a witness answers from must be sent with the commission, and the fact certified by the commissioners.

18 *Answers to Interrogatories.*

City Court of Atlanta, Ga.

MRS. S. E. POWERS *et al.*
vs.
R. & D. R. R. Co.

Interrogatories to be propounded to R. H. Monday, a material witness for the pl'ff, who resides in Lula, Ga.

STATE OF GEORGIA,
Hall County.

By virtue of a commission from the honorable the superior court of Fulton county to us directed, we have caused R. H. Munday, the witness in said commission named, to come before us, *and* being duly sworn true answers to make to the interrogatories to said commission annexed deposes and answers as follows:

To the 1st int'y he answers: I reside in Lula; my occupation is a porter.

To the 2nd int'y he answers: I was living in Lula at the time of said accident, but did not see it. I saw the train come in Lula in a very fast speed. I was on the side of road next to hotel about 100 feet from the track upon which the train came in on; yes, I saw it when it first came in. The speed the train was running by which was unusually fast. The train was running at about the rate of 12 miles per hour. I do not know. It gave no signals whatever. The bell did not ring nor the whistle blow.

To the 3rd int'y he answers: I did not notice. I saw the
19 post, and the man was struck about 20 feet from the post towards Charlotte, as sign showed next morning. The train did not stop at the post, but ran about 200 feet beyond the post or its usual stopping place. Yes; the post was moved about 50 feet towards Atlanta the first morning after the accident.

To the 4th int'y he answers: I know nothing more beneficial.

To 1st cross-int'y he answers: I am a porter, and have been for nearly two years. I live in Lula. I am about 40 years old; a white man. No one or place.

R. H. MUNDAY.

Answered, sworn to, and subscribed before us this 26th day of January, 1887.

H. N. GOWDER, [L. S.]
Commissioner.
I. H. HUGGINS, [L. S.]
Commissioner.

Endorsements on envelope.

Received of H. N. Gowder, com'r, and forwarded by due course of mail.

C. W. ASBURY,
P. M., P. O., Lula, Ga.

Received at Atlanta, Ga., January 27th, 1887, by due course of mail.

J. W. RENFROE, *P. M.*

Received this package from the hand of J. W. Renfroe, P. M., upon the usual oath, in open court, with leave to open, January 28, 1887.

J. S. HOLLIDAY, *D. C.*

20 *Interrogatories for J. C. McDonald.*

MAGGIE L. POWERS *et al.*
vs.
R. & D. R. R. Co.
} Damages. City Court of Atlanta.

Interrogatories to be propounded to J. C. McDonald, a resident of Detroit, Michigan.

1 Int'y. Where were you on the 11th of April, 1886?
2 Int'y. If you state that you were at Lula, Ga., at the time the

north-bound train from Atlanta stopped for supper, state whether or not you saw any one injured at or near that place. If so, how was he injured? If you state that you saw the south-bound train run over Mr. Powers, state what signals the south-bound train was giving at the time and before it struck Mr. Powers and how far the train ran after striking him.

3 Int'y. State anything further that you may know that will benefit the plaintiff.

HOKE & BURTON SMITH,
Pl'ff's' Att'ys.

Cross-Int'ys.

1. Where were you at the time and during the time you testify about?

2. Were you specially listening for a bell or whistle? Might not a signal have been given and you not have heard it?

3. Did not the engine have a headlight? Was not a torch or large light burning and giving light over the premises?

4. Did you not hear some one call to Mr. Powers to look out?

HOPKINS & GLENN,
Def't's Att'ys.

21 *Service.*

Service acknowledged.
Nov. 13, 1886.

HOPKINS & GLENN,
Def'ts' Atty's.

22 *Commission for Interrogatories.*

STATE OF GEORGIA, }
Fulton County. }

By his honor Howard Van Epps, judge of the city court of Atlanta for the county and State aforesaid.

To J. H. McDonald, W. B. Jackson:

Whereas there is a certain matter in controversy now depending in the city court of Atlanta for said county between Maggie L. Powers *et al.*, by next friend, and The Richmond & Danville Railroad Co.;

And whereas J. C. McDonald is a material witness in said suit and cannot attend our said court in person without manifest inconvenience:

Now, know ye that we, reposing special trust and confidence in your prudence and fidelity, have appointed you and you or any two more of you are hereby authorized and required to cause the said witness personally to come before you, and, after being duly sworn, to examine him concerning the said suit agreeably to the interrogatories hereunto annexed; and the answers to the same being

plainly and distinctly written, you are to send the same, closed up under your hands and seals, to our said court, now in session, together with this writ.

Witness the Honorable Howard Van Epps, judge of our said court, this 22 day of November, 1886.

C. H. STRONG, *Clerk.*

Instructions to Guide in Taking Testimony.

First. Fill the blank in the commission with the names of the persons officiating as commissioners. (Two may act. Less than two will not suffice.)

Second. Take a separate sheet of paper, state the case precisely as it is at the head of the interrogatories, then write the following formula:

STATE OF ——, }
County of ——. }

By virtue of a commission from the honorable the superior court of —— county to us directed, we have caused (insert the name of witness or witnesses) the witness in said commission named to come before us, *and*, being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

To the first interrogatory he answers (and so with the rest of the answers). When all are answered let the witness subscribe them. Then the commissioners will observe the following form at the end of the answers:

Answered, sworn to, and subscribed before us this — day of ——, 18—.

—— ——, [L. S.]
Commissioner.
—— ——, [L. S.]
Commissioner.

Then annex the answers to the interrogatories with a wafer, seal all up in one packet, put as many seals on the envelopes as there are commissioners, let each commissioner write his name across the seal, adding the word "commissioner." Direct the package: "To the clerk of — court of —— county, Georgia." If the packet is to be sent by mail let the postmaster certify as follows: "Received this packet from —— ——, Esq., one of the commissioners. —— ——, postmaster at ——."

State the case on the outside of the envelope just as it is in the caption of the interrogatories.

NOTE.—1. No party or his counsel or agent or other person in his behalf can be present at the execution of the commission.

NOTE.—2. No person who would be incompetent as a juror on account of relationship and no attorney of either of the parties, clerk, or agent paid to discharge this duty can be a competent commissioner.

3. Witnesses may write out their answers only in presence of the commissioners and by their consent and in no other way.

4. All written memoranda that a witness answers from must be sent with the commission, and the fact certified by the commissioners.

23 *Answers of J. C. McDonald.*

City Court of Atlanta.

MAGGIE L. POWERS *et al.*, by Next Friend, }
vs. }
R. & D. R. R. Co. }

STATE OF MICHIGAN, }
City of Detroit & County of Wayne. }

By virtue of the commission attached we have caused J. C. McDonald, the witness in said commission named, to come before us, who, being duly sworn true answers to make to interrogatories attached, deposes and answers as follows:

To the first interrogatory he answers: I was at Lula, Georgia, on that day; it was Sunday and at the time the north-bound train from Atlanta stopped there for supper; the south-bound train also stopped.

To the second interrogatory he answers: I saw a man named Powers injured at that place. He was run over by the south-bound train. The south-bound train gave no signals or warning; did not whistle or ring any bell either at the time or before it struck Mr. Powers. I don't think the train ran more than the length of a coach after it struck Mr. Powers. There is a possibility that a signal was given, but I certainly heard none, and I don't see how I could miss hearing it if one was given.

24 To the third interrogatory he answers: There was no one there to direct people to the different trains; there was no lights except a torch-light leading passengers to the eating-house. My business is travelling salesman for the National Wire and Iron Company of Detroit, Michigan. I remember nothing else that would benefit plaintiff.

JOHN C. McDONALD.

Ans. to Cross-Int'ys.

To the first cross-interrogatory he answers: I was at Lula Junction, Ga.

To the second cross-interrogatory he answers: I was not specially listening for a bell or whistle. I heard no bell or whistle, and a

signal by the bell or whistle could not have been given without me hearing it.

To the third cross-interrogatory he answers: Yes; I think the engine had a head-light. There was a torch burning, giving light to the eating-house, but it did not give light to the tracks where the trains were moving on.

To the fourth cross-interrogatory he answers; No; I did not.

JOHN C. McDONALD.

Answered, sworn to, and subscribed before us this 24 day of November, 1886.

J. H. McDONALD, *Com'r.* [L. S.]
WM. B. JACKSON, *Com'r.* [L. S.]

25 Endorsements on envelopes.

Received the within from J. H. McDonald, one of the commissioners, and forwarded the same by due course of mail.

____ ____,
Postmaster, Detroit, Mich.

Failure of postmaster to sign in Detroit waived.
Dec. 13, 1886.

HOKE & BURTON SMITH,
Pl'ffs' Att'ys.
HOPKINS & GLENN,
Def't's Att'ys.

Received by due course of mail at Atlanta, Ga, P. O. this November 26, 1886.

A. P. WOODWARD, *Ass't P. M.*

Received this package from the hands of A. P. Woodward, dep. P. M., upon usual oath, in open court, with leave to open, this 29 Nov., 1886.

J. S. HOLLIDAY, *D. S.*

Interrogatories of C. W. Asbury, J. L. Nesbit, G. R. Farmer, W. S. Logan, and Green Colhun.

MAGGIE L. POWERS *et al.*, by Next Friend, } Damages. City Court
vs. } of Atlanta.
R. & D. R. R. Co. }

Interrogatories to be propounded to C. W. Asbury, J. L. Nesbitt, G. R. Farmer, W. S. Logan, and Green Colhum, residents of Lula, Georgia.

26 1 Int'y, to all the witnesses. Where do you reside? What number of tracks are there at Lula, Ga., upon which trains of the Richmond and Danville railroad run?

2 Int'y. Where were you on the 11th of April, 1886, as the train from Atlanta came in on the R. & D. R. R.? Which track did the train come in upon with reference to the hotel? What was the usual way used by the passengers from this train to the hotel or to the place where supper could be obtained? Did any other train meet the train from Atlanta that night at Lula? From what direction was the other train coming?

3 Int'y. Which of the two trains moved first after the Atlanta train reached Lula? In what way did it move? What signals, if any, did it give? Was any one hurt at or about that time? If so, who and in what way?

4 Int'y. Was there any post at or near the place where the person was hurt, if you say that some one was injured, at the time he was injured? What kind of post was it? Where was the post the next morning? How fast was the train running which struck the person at the time mentioned? Who was injured? How far did the train run after striking him?

5 Int'y. State anything further that you may know that will benefit the pl'ff.

HOKE & BURTON SMITH,
Pl'ffs' Att'ys.

Cross-Interrogatories.

27 1. Where were each of you during all the time you testify about? Did either of you see the train strike Mr. Powers?

2. Was not the bell ringing and the head-light burning? Was not the torch burning which lighted the grounds?

3. If you saw it, state how Mr. Powers attempted to cross the track.

HOPKINS & GLENN,
Def't's Att'ys.

Service.

Service acknowledged Nov. 15, 1886.

HOPKINS & GLENN,
Def't's Att'ys.

28 *Commission for Interrogatories.*

STATE OF GEORGIA, }
Fulton County. }

By his honor Howard Van Epps, judge of the city court of Atlanta for the county and State aforesaid.

To H. N. Gowder, I. H. Huggins.

Whereas there is a certain matter in controversy now depending in the city court of Atlanta for said county between Maggie L. Powers *et al.*, by next friend, and The Richmond & Danville Railroad Co.;

And whereas C. W. Asbury, J. L. Nesbitt, G. R. Farmer, W. S.

Logan, and Green Colhum are material witnesses in said suit and cannot attend our said court in person without manifest inconvenience:

Now know ye that we, reposing special trust and confidence in your prudence and fidelity, have appointed you and you or any two more of you are hereby authorized and required to cause the said witnesses personally to come before you, and, after being duly sworn, to examine them concerning the said suit agreeably to the interrogatories hereunto annexed; and the answers to the same being plainly and distinctly written, you are to send the same, closed up under your hands and seals, to our said court, now in session, together with this writ.

Witness the Honorable Howard Van Epps, judge of our said court, this 23 day of November, 1886.

C. H. STRONG, *Clerk.*

Instructions to Guide in Taking Testimony.

First. Fill the blank in the commission with the names of the persons officiating as commissioners. (Two may act; less than two will not suffice.)

Second. Take a separate sheet of paper, state the case precisely as it is at the head of the interrogatories, then write the following formula:

STATE OF ——,)
County of ——.)

By virtue of a commission from the honorable the superior court of —— county to us directed, we have caused (insert the name of witness or witnesses) the witness in said commission named to come before us, *and*, being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

To the first interrogatory he answers (and so with the rest of the answers). When all are answered let the witness subscribe them. Then the commissioners will observe the following form at the end of the answers:

Answered, sworn to, and subscribed before us this — day of ——, 18—.

—— ——, [L. S.]
Commissioner.
—— ——, [L. S.]
Commissioner.

Then annex the answers to the interrogatories with a waifer, seal all up in one packet, put as many seals on the envelopes as there are commissioners, let each commissioner write his name across the seal, adding the word "commissioner." Direct the package: "To the clerk of —— court of —— county, Georgia." If the packet is to be

sent by mail, let the postmaster certify as follows: "Received this packet from —— ——, Esq., one of the commissioners. —— ——, postmaster at ——."

State the case on the outside of the envelope just as it is in the caption of the interrogatories.

NOTE—1. No party, or his counsel or agent or other person in his behalf, can be present at the execution of the commission.

2. No person who would be incompetent as a juror on account of relationship, and no attorney of either of the parties, clerk, or agent paid to discharge this duty can be a competent commissioner.

3. Witnesses may write out their answers only in presence of the commissioners and by their consent, and in no other way.

4. All written memoranda that a witness answers from must be sent with the commission and the fact certified by the commissioners.

29 *Answers to Interrogatories.*

STATE OF GEORGIA, }
Hall County. }

By virtue of a commission from the honorable the superior court of Fulton county, to us directed, we have caused W. S. Logan and G. R. Farmer, the witnesses in said commission named, to come before us, and, being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

W. S. Logan.

To the 1st int'y he answers: At Lula, Hall Co., Ga. There are two tracks.

To 2nd int'y he answers: I was standing between the two tracks, second track from the hotel, crossing the main line or track nearest the hotel. Yes; the south-bound train, coming from the north.

To 3 int'y he answers: The south-bound train, south. There was no signals given. Mr. Powers was hurt. The pilot in front on the engine knocked him down and rolled him about 35 or forty feet.

To 4th int'y he answers: I don't know. I don't know anything about the post. Eight or ten miles to the hour. Mr. Powers. About 35 or 40 feet, and the pilot in front of engine threw him off and the train then ran about 100 feet further before stopping.

To 5th int'y he answers: Mr. Powers died about two o'clock that night from the injury he received by the train.

30 To 1 X int'y he answers: I was standing between the two tracks. I did not see the train strike Mr. Powers, but saw him while being injured.

To 2 X int'y he answers: The bell was not ringing, and did not notice whether the head-light was burning or not. There was no torch burning to light up the grounds.

To 3 int'y he answers: I did not see him attempt to cross the track. He was down, being rolled by the engine, when I first saw him.

W. S. LOGAN.

Answered, sworn to, and subscribed before us this 10 day of December, 1886.

H. N. GOWDER, *Com'r.* [L. S.]
I. H. HUGGINS, *Com'r.* [L. S.]

Answer of G. R. Farmer.

STATE OF GEORGIA, }
Hall County. }

By virtue of a commission from the honorable the superior court of Fulton county, to us directed, we have caused G. R. Farmer, W. S. Logan, the witnesses in said commission named, to come before us, and, being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

G. R. Farmer.

To the 1st int'y he answers: I live at Lula, Hall Co., Ga. There are two tracks upon which the R. & D. passenger trains run.

31 To the 2nd int'y he answers: I was standing between the two tracks upon which the R. & D. passenger trains run. The train came in upon the track furthest from the hotel, cross the main line or track nearest the hotel. Yes; the south-bound train, from the North.

To the 3 int'y he answers: South-bound train. There were no signals given. Mr. Powers was hurt by the engine, which knocked him down and rolled him about 35 feet and then threw him off and ran still about 75 feet forth.

To the 4 int'y he answers: Yes; there was a stop-post. It was moved further south next day. Twice as fast as a man can walk. Mr. Powers. About 100 feet.

To the 5 int'y he answers: Mr. Powers died that night, about two o'clock, from the injury he received by the train.

To the 1 X int'y he answers: I was standing between the two tracks upon which the trains run. I did not see the train strike Mr. Powers.

To the 2 X int'y he answers: The bell was not ringing but the head-light was burning.

To the 3 X interrogatory he answers: I did not see Mr. Powers attempt to cross the track.

G. R. FARMER.

Answered, sworn to, and subscribed before us this the 10th day of December, 1886.

H. N. GOWDER, *Com'r.* [L. S.]
I. H. HUGGINS, *Com'r.* [L. S.]

32 Endorsements on envelope.

Received of H. N. Gowder, commissioner, and forwarded by due course of mail.

C. W. ASBURY,
P. M., Lula, Ga.

Received at Atlanta, Ga., December 11, 1886, by due course of mail.

J. W. RENFROE.

Received from the hands of A. P. Woodward, dep. P. M., the within package, upon the usual oath, this 13 Dec., 1886.

J. S. HOLLIDAY, *D. C.*

We agree to open December 17, 1886.

HOPKINS & GLENN.
HOKE AND BURTON SMITH.

Int'ys for Thos. M. Hughes.

City Court of Atlanta.

MAGGIE L. POWERS *et al.*, by Next Friend,
vs.
R. & D. R. R. Co. } Damages.

Interrogatories to be propounded to Thos. M. Hughes, a resident of Cherokee county, to be examined in behalf of the plaintiffs in the above-stated case.

1 Int'y. What is your business?

2 Int'y. Where were you on the 11th of April, 1886? If you state that you were at Lula, Ga., state whether or not you saw the trains of the R. & D. R. R. come into Lula. Did you see the south-bound train move after the north-bound train arrived? Where were you at the time? Did you see any one injured? If so,
33 whom & in what way? What struck him? What became of him after he was struck?

3 Int'y. What signals were given by the engine of its approach before and at the time it struck the man?

4 Int'y. State anything further you may know that will benefit the plaintiffs.

HOKE & BURTON SMITH,
Pl'ffs' Att'ys.

Cross-Int'ys.

1. What is your age and color? To whom have you talked or written about this case?

HOPKINS & GLENN,
Def't's Att'ys.

Service.

Service acknowledged. Let commission issue.
January 17, 1887.

HOPKINS & GLENN,
Def't's Att'ys.

34 *Commission for Interrogatories.*

STATE OF GEORGIA, }
Fulton County. }

By his honor Howard Van Epps, judge of the city court of Atlanta for the county and State aforesaid.

To —— ——:

Whereas there is a certain matter in controversy now depending in the city court of Atlanta for said county between Maggie L. Powers *et al.*, by next friend, and The Richmond & Danville R. R. Co.;

And whereas Thomas M. Hughs is a material witness in said suit, and cannot attend our said court in person without manifest inconvenience:

Now know ye that we, reposing special trust and confidence in your prudence and fidelity, have appointed you, and you or any two more of you are hereby authorized and required to cause the said witness personally to come before you, and, after being duly sworn, to examine him concerning the said suit agreeably to the interrogatories hereunto annexed; and the answers to the same being plainly and distinctly written, you are to send the same, closed up under your hands and seals, to our said court, together with this writ.

Witness the Honorable Howard Van Epps, judge of our said court, this 20 day of January, 1887.

C. H. STRONG, *Clerk.*

Instructions to Guide in Taking Testimony.

First. Fill the blank in the commission with the names of the persons officiating as commissioners. (Two may act. Less than two will not suffice.)

Second. Take a separate sheet of paper, state the case precisely as it is at the head of the interrogatories. Then write the following formula:

STATE OF ——, }
County of ——. }

By virtue of a commission from the honorable the superior court of —— county, to us directed, we have caused (insert the name of witness or witnesses) the witness in said commission named to come before us, and, being duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

To the first interrogatory he answers (and so with the rest of the answers). When all are answered, let the witness subscribe them. Then the commissioners will observe the following form at the end of the answers:

Answered, sworn to, and subscribed before us this — day of ——, 18—.

—— ——, [L. S.]
Commissioner.
—— ——, [L. S.]
Commissioner.

Then annex the answers to the interrogatories with a wafer, seal all up in one packet, put as many seals on the envelopes as there are commissioners, let each commissioner write his name across the seal, adding the word "commissioner." Direct the package: "To the clerk of —— court of —— county, Georgia." If the packet is to be sent by mail, let the postmaster certify as follows: "Received this packet from —— ——, Esq., one of the commissioners. —— ——, postmaster at ——."

State the case on the outside of the envelope just as it is in the caption of the interrogatories.

NOTE.—1. No party, or his counsel or agent or other person in his behalf, can be present at the execution of the commission.

2. No person who would be incompetent as a juror on account of relationship, and no attorney of either of the parties, clerk, or agent paid to discharge this duty can be a competent commissioner.

3. Witnesses may write out their answers only in presence of the commissioners and by their consent, and in no other way.

4. All written memoranda that a witness answers from must be sent with the commission and the fact certified by the commissioners.

35 *Answers of Thomas M. Hughs.*

City Court of Atlanta.

MAGGIE L. POWERS *et al.*, by Next Friend, *vs.* R. & D. R. R. COMPANY. } Damages.

STATE OF GEORGIA, *Cherokee County.*

By virtue of a commission from the honorable city court of the city of Atlanta, to us directed, we have caused Thomas J. Hughs, the witness in said commission named, to come before us, and, being

duly sworn true answers to make to the interrogatories to said commission annexed, deposes and answers as follows:

1st Int'y he answers: My present business is school teaching.

2 Int'y he answers: On the 11 of April, 1886, I was in Lula, Georgia. I saw the trains of the Richmond and Danville railroad come into Lula. I was standing off about 15 or 20 steps from the railroad track when the south-bound train came in. It was just after dark. I did not see W. D. Powers struck by the engine, but when the train ran up I heard some one holler, and after the train stopped I came up to the engine and found that Mr. Powers had been killed.

3d Int'y he answers: No signals were given by the engine of its approach—the bell was not ringing and the whistle did not blow. The train was running pretty rapidly and was making no
36 noise except that occasioned by running. The engine ran ten or fifteen yards after I heard it strike the man, whom I afterwards learned to be Mr. Powers. The other engine was making considerable noise, made by the escaping of steam. I know that no signal was given, because I remarked to Mr. Ingleker, with whom I was talking when I heard the engine strike the man, that the bell did not ring nor did the whisle blow, and now they have killed somebody or hurt some one badly. The engineer could have seen the man for several hundred yards if he had been at his post and on the lookout.

4th Int'y. I know nothing further that would benefit the plaintiff.

To the first cross-interrogatory he answers: I am a white man, fifty-three years old. I have talked with Mr. Adolphus Ingleker and have written to Mr. Hoke Smith about this case.

THOMAS J. HUGHES.

Answered, sworn to, and subscribed before us at Holly Springs, Cherokee county, Ga., this 25 day of January, 1887.

JOHN D. ATTANAY, *Com'r.* [L. S.]
GEORGE R. BROWN, *Com'r.* [L. S.]

Endorsements on envelope.

Received this package of John D. Attanay, one of the commissioners, this 25 day of January, 1887.

H. C. KELLOGG, *P. M.*

37 Received at Atlanta, Ga., January 25, 1887, by due course of mail.

J. W. RENFROE.

Received from the hands of A. P. Woodward, dep. P. M., upon the usual oath, in open court, with leave to open January 27, 1887.

J. S. HOLLIDAY, *D. C.*

Petition for Making Parties.

Mrs. S. E. Powers
vs.
R. & D. R. R. Co.

The plaintiff in the above-stated case having died, Maggie L. Powns, Homer N. Powers, and Lula N. Powers, through their next friend, C. F. Reed, show to the court that they are the minor children of W. D. Powers, deceased, and that their ages are respectively sixteen, fourteen, and ten years.

They further show that since the bringing of said suit their mother has died, and they ask to be made parties plaintiffs by and through their next friend, C. F. Reed.

HOKE & BURTON SMITH,
Pl'ffs' Att'ys.

Service.

Service on the foregoing petition acknowledged this the 19 day of October, 1886.

HOPKINS & GLENN,
Def't's Att'ys.

Filing.

Filed in office October 22, 1886.

C. H. STRONG, *Clerk.*

38 *Order Making Parties.*

The foregoing petition is granted. C. F. Reed is appointed guardian *at litem* for Maggie L., Homer W., and Lula W. Powers, and said persons are made parties pl'ffs in said case, and C. F. Reed is made party plaintiff as their next friend and guardian *ad litem* October 22nd, 1886, in open court.

HOWARD VAN EPPS,
Judge C. C. A.

39 *Petition.*

Petition for removal on the ground of citizenship, under the act of March 3, 1875, where the adversary parties are all citizens of different States, and all the plaintiffs or all the defendants unite in the petition for removal.

In the City Court of Atlanta, State of Georgia.

C. F. Reed as Next Friend of Maggie L. Powers, Homer W. Powers Helen W. Powers' Plaintiff, *vs.* The Richmond & Danville Railroad Company, Defendant.	Petition for Removal to the Circuit Court of the United States, District of ——.

To the honorable the city court of Atlanta, State of Georgia:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is citizen of the State of Virginia, and that said Reed, next friend, & and said minors were then and still are *then and still* citizens of the State of North Carolina.*

And your petitioner offers herewith a good and sufficient surety for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Georgia]; and it will ever pray.

HOPKINS & GLENN,
Attorney-for Petitioner.

STATE OF GEORGIA, }
County of Fulton, } *ss:*

I, Jno. T. Glenn, being duly sworn, do say that I am a member of the firm of Hopkins & Glenn, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

JNO. T. GLENN.

Subscribed by the said Jno. T. Glenn in my presence *by* and by him sworn to before me this 29 day of January, A. D. 1887.

[SEAL.] F. M. COKER,
Not. Pub., Fulton Co., Ga.

* NOTE.—Here give in like manner the citizenship of each of the several plaintiffs and defendants in the cause.

If, however, all the parties, plaintiff or defendant, do not join in the application for the removal, and the application is made under the latter clause of sec. 2 of the act of March 3d, 1875, by part of the plaintiffs or part of the defendants actually interested in the controversy, follow this form down to the star (*), giving the citizenship of each of the plaintiffs and defendants, and then add the following:

"Your petitioner states that in the said suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between the said petitioner and the said ——, the said —— and the said —— (naming the parties actually interested in the controversy.)"

If the nature of the controversy does not fully appear in the pleadings, it may be advisable to add a statement of the facts showing the case to be one within the latter clause of sec. 2 of March 3, 1875, after which let the petition follow the form above given.

If the petition for removal is on the ground that the suit is one "arising under the Constitution or laws of the United States or treaties made under their authority," it is not necessary to state the citizenship of the parties. It is, however, proper to do so; and if there are several parties and the transaction in controversy is complex, it may be advisable to state the citizenship of each. This form can, therefore, be followed down to the (*), and then there may be added the following:

"Your petitioner states that the said suit is one arising under the laws of the United States, in this, to wit: (Here state the facts which show the Federal character of the case; see Dillon on Removal of Causes, §§ 2 and 8.)"

After which let the petition continue as in the form above given.

[Endorsed:] Petition to remove cause on ground of citizenship. In the — court of —, — term, 188-. —— ——, plaintiff, against —— ——, defendant. Petition to remove said cause to the circuit court of the United States for the — district of —, on the ground of citizenship. Filed the — day of ——, 188-. —— ——, clerk. —— ——, attorney for petitioner.

40 *Bond.*

Bond for the removal of a cause under the act of March 3, 1875.

Know all men by these presents that we, The Richmond & Danville Railroad Company, as principal, and E. Berkeley, as sure*ties*, are held and firmly bound unto C. F. Reed, as next friend of the minors Maggie L. Powers, Homer W. Powers, & Helen W. Powers, being the minor children of Mrs. S. E. Powers, in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made unto the said heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said The Richmond & Danville Railroad Company having petitioned the city court of Atlanta, State of Georgia, for the removal of a certain cause therein pending, wherein *in* Reed, as next friend aforesaid, is the plaintiff and The Richmond & Danville Railroad Company is defendant, to the circuit court of the United States in and for the northern district of Georgia:

Now, if the said The Richmond & Danville Railroad Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto,* then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 29th day of January, A. D. 1887.

THE RICHMOND & DANVILLE
RAILROAD CO., [L. S.]
By its att'y, JNO. T. GLENN. [L. S.]
E. BERKELEY. [L. S.]

STATE OF GEORGIA, }
County of Fulton, } ss:

I, E. Berkeley, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Georgia and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Georgia, liable to execution, of the value of more than five hundred dollars.

E. BERKELY.

Subscribed in my presence by E Berkely and by him sworn to before me this 29th day of January, A. D. 1887.

[L. S.] R. A. MONTUCK,
N. P., Fulton Co., Ga.

*NOTE.—If special bail was originally requisite in said cause, then add "and shall then and there appear and enter special bail in said suit."

It is advisable that the sureties justify, but it is not absolutely necessary.

[Endorsed:] Bond for removal of cause under act of 1875. In the — court of —, — term, 188–. —— ——, plaintiff, against —— ——, defendant. Bond for the removal of said cause to the circuit court of the United States for the — district of —, under act of March 3, 1875. Filed the — day of ——, 188–. —— ——, clerk. —— ——, attorney for petitioner.

41 *Clerk's Certificate.*

GEORGIA, }
Fulton County. }

I, C. H. Strong, clerk of the superior court in and for said county, do hereby certify the above and foregoing to be a true and correct copy of all the proceedings in the case of C. F. Reed, next friend, *vs.* R. & D. R. R. Co., as appears of record in this office.

Given under my hand and seal of office this Feb. 5, 1887.

[L. S.] C. H. STRONG, *C. S. C.*

Filing.

Filed in office this 7 day of February, 1887.

A. E. BUCK, *Clerk.*

42 *Amendment.*

REID, Next Friend, }
vs.
R. & D. R. R. Co. }

The plaintiff amends his declaration as follows:

The defendant was negligent on account of moving its south-bound train at the time and to the place alleged in the declaration.

The defendant was negligent while said train was moving, on

account of not taking sufficient precaution to prevent said train from striking and running over the deceased or other persons. The egress furnished by the defendant was not safe, because a train was moved across it and because the defendant did not use any special act of precaution, such as having some one walk in front of the train to prevent accident, and because the defendant did not have any sufficient watch kept to prevent passengers from being upon the track on which said train was moved at the time that said train was moved or to prevent the engine from running over them. The track was not watched carefully and closely by the engineer and fireman, and the conductor and train hands did not watch and aid in moving the train and protecting those between the north-bound train and the hotel. The fireman and engineer were so careless that they did not know when they struck deceased and did not know they
43 had struck him until he had been killed and until they were some distance from the place of the accident. The conductors were at the time in the hotel and away from the trains.

HOKE & BURTON SMITH, *Pl'ff's Att'ys.*

Filing.

Filed in clerk's office May 30, 1888.

H. C. HAMILTON, *D. Cl'k.*

44 *Verdict.*

We, the jury, find for the plaintiff- nine thousand and eight hundred dollars, $9,800.00.

This Nov. 28, 1888.

FRANK Z. CURRY, *Foreman.*

Judgment.

Whereupon judgment is rendered in favor of the plaintiffs against the defendant for ninety-eight hundred dollars, principal, and costs.

HOKE & BURTON SMITH,
Pl'ffs' Att'ys.

Filing.

Judgment signed and filed in open court this November 30, 1888.

O. C. FULLER, *Dep. Clerk.*

45 *Bill of Exceptions.*

Be it remembered that at the October term of the circuit court of the United States for the northern district of Georgia, in the year 1888, the Hon. William T. Newman presiding, there came on for trial the case of C. F. Reed, as next friend, against The Richmond & Danville Railroad Company, being then and there an action for damages for personal injuries, a jury being regularly impa/n-lled, the following evidence was introduced and exceptions taken :

Miss MAGGIE POWERS sworn for the plaintiff:

I am Miss Maggie Powers. I am the daughter of Mr. Powers, deceased. My mother is not living. She died in July, after my father's death. My father left three children. I am the eldest of the three. James N. Powers and Lulu M. Powers are the names of the other two children.

Mr. Glenn objected to the names of the children.

By Mr. SMITH: I am obliged to bring in the names of the parties. I wish to show their names.

Q. What is your age?

A. I am nineteen. I am the eldest. My brother is sixteen and my sister is twelve. My father was employed by Mr. Frank E. Block. He was working for him when he died. When he died he had been employed by Mr. Block about three years altogether. He was a drummer. Before he had been employed by Mr. Block he was with a gentleman in Baltimore. He was doing the same business for a firm in Baltimore—travelling. He had been working
46 for them about three years. Before he went with this Baltimore firm he was in business in Charlotte, N. C. I do not know what salary he was making then. I do not know what salary he made in any of these places, except what I have been told. I heard what he was making, and I know from that what he was making, but I did not know from my own knowledge. I do not know what my father's age was, except what I have been told. He was 45 years old when he died. I do not know that of my own knowledge. I get it from the family.

Q. (Exhibiting a document.) Do you know what that is?

A. It is a family register. That refers to my father's age.

Q. When was your father born, Miss Maggie?

A. He was——

By Mr. GLENN: I object to that question being asked, your honor. It is utterly impossible for this witness to know when her father was born.

By Mr. SMITH: I offer this in evidence. This is a copy of the family Bible—an extract made from it.

The COURT: You cannot put that in. That does not seem to be an original document. It is a copy or extract from some document.

By Mr. SMITH: Very well, your honor; I do not waive my right, but the fact can be proven by hearsay—by general understanding.

The COURT: Then so prove it.

Q. How old was your father at the time of his death?

A. He was 45 years old.

47 Cross-examination:

This was my father's family register. He gave it to me before he died. I do not know whose writing that is (referring to document). It is not my father's writing. It may be his father's or his uncle's. I do not know. That was the original family register.

Q. You mean that this was a copy from the family register?

A. No, sir; that was the family register. My mother had a family Bible, and his age was in that, and that was the age that he was given—45 years. I do not know who wrote that. I guess that was the family record.

O. F. SIMPSON sworn for the plaintiff:

I am book-keeper for Frank E. Block. I have been working for him seven or eight years. I knew Mr. Powers for about two years previous to his death. I remember when he died. It was on the 11th of April, 1886. He was at work for Frank E. Block as a drummer. He had been travelling for Mr. Block about two years. He began working for him the first of September, 1883, and he worked on continuously until January, 1885; then he quit Mr. Block and went to Baltimore to engage with a Baltimore house; but he did not stay there long, for he left the Baltimore house and came back to Mr. Block in September of that same year and was with him continuously until his death—I think about two years altogether. I think he was offered a larger salary by the Baltimore people, and he left for the inducement of a better salary. Mr.
48 Powers received a salary of $83.33 a month, or about $1,000 a year. He was a good business man of temperate habits. He was a very industrious and worthy man and very reliable in every way. He understood his business and attended to it. I cannot say as to his prospects of an increase of salary. I know some of Mr. Powers' family by sight; don't think I ever saw all the family. I suppose he spent $50.00 a year for personal expenses, clothing, shoes, hats, &c. Mr. Block paid his expenses on the road. He would make trips of about a month or six weeks in length and would then come in and remain two or three days, except in the month of December, when he would come in just before Christmas and stay in until the latter part of that month. His family always boarded in Atlanta, but I do not remember the house where he always staid. I remember the place, but I do not remember who kept it. I seem to remember a place at the junction of Broad and Peachten streets. He was a very economical man—much more so than any man in the house. He was very economical indeed. I can't say as to what it cost him to live in Atlanta when he would return at the end of his trip and stay here three or four days. I have no knowledge about it except what he told me himself. I could estimate it, but I do not actually know.

Miss MAGGIE POWERS recalled:

Q. What knowledge have have you as to what your father paid for individual board—for individual and personal expenses—
49 for his living and not for the expense of his family—when he was here at the end of his trip?

A. Well, I don't know exactly what he paid, but I think it was about one dollar a day while he was here. I am sure it was not more than that.

Q. What did he pay for the balance of the family?

By Mr. GLENN: I do not think the testimony admissible.
Mr. Smith insisted that it was admissible.
Objection overruled.

Q. Miss Maggie, how much did he have to pay for the four of you per month?
A. He paid $60.00 a month.

Cross-examination:

I was about fifteen years old then. We were boarding there at the time he was killed. I sometimes paid the board. I did not have anything to do with paying my father's board when he was there.

J. W. POWERS sworn for the plaintiff:

I am the brother of Mr. Powers whose children are the plaintiffs in this suit. My father died at the age of 77 and my mother was five years younger than he. They both died about the same time, of smallpox. I do not know the length of the lives of my grandparents.

Counsel for plaintiffs offered in evidence tables in 70th Ga.

A. B. WESTBROOK sworn for the plaintiff:

My name is A. B. Westbrook. I live in McDonough, Henry county. I met Mr. Powers, the gentleman who was killed at Lula, on the train. He was killed on the 11th day of April, 1886.
50 I met him for the first time on that day. That was the first time I ever saw him. He was on the train with me. I had accompanying me on that trip my wife and two children. Mr. Powers was alone—no one with him that I could see. I was going to Banks Co. I was to get off at Harmony Grove. The station that I was to get off at, on the Richmond & Danville road, was Lula. As we were coming up on the train Mr. Powers was sitting in a seat near me and the children were sitting in a seat near to him, and he commenced talking to them and asking them questions, and then we got to talking together, and he asked me where I was from and where I was going to. We just naturally got to talking, as people will do sometimes. When I got to Lula I got out of the end of the car towards the north—the end furthest away. When we reached there the porter called out "Lula," and then, "Fifteen minutes for supper," and that we were to change cars; and after he had passed on Mr. Powers said that he was to change there and get supper, and then the train stopped. We got off, and after he made that remark he said——

(Mr. Glenn objected.)

I got out of the end of the car that was towards Charlotte. When I got out of the car Mr. Powers was on the ground in front of me. I had assistance in getting off the train. Mr. Powers assisted me. I went out first and then my wife followed, and I had one of the children in my arms and I kind of slipped, and Mr. Powers said, "Let me help you," and he reached out and helped me. I do not

know where the conducter was all this time. I did not see
51 him at all. I don't know where the other train hands were all this time. I did not see any of them. They were not around there. If they had been there I would have seen them. Did not any of them help me get off the cars that night. Nobody but Mr. Powers helped me. After we got off the train we were sort of north of the hotel. We had to turn back towards Atlanta to get to the hotel. After we got off and turned to go to the hotel our backs were sort of towards the train that we had just left, and towards the engine also. I had the children with me and then the baggage to impede my movements in helping myself. Mr. Powers had got off the train and was on the ground when we got off, and he turned and said, "Let me help you," and he did help us off. I had the two children and my wife and the baggage, and I let him help us. Mr. Powers had a hand-satchel or something like that, if I am not mistaken. When me and my wife got down he said, "Well, let's go over there to the supper-house." He was in front. When we started over to the supper-house my wife went off first, and then I had put down my little boy and I had my little girl, and I came after them, and then Mr. Powers came last of all. I recollect that he was right close to me all the time. He was walking right by me and a little bit behind me all the time. I never heard him speak after what he said at first about "Let me help you." I do not recollect him saying a single word after that. There was hardly time to say anything. The next thing that happened I
heard some one hallo-, "Look out! Look out! Look out for the
52 engine!" or something like that, and, sure enough, it was a train. After that was said it looked like the train passed almost in a second. I might say that the train came within a foot of me and my wife and children. I just gave a sideways jump and grabbed my wife and threw my children there. I fell on my knees on a little platform, and as I struck the platform I felt something hit the heels of my shoes. It was all I could do to make the jump and get my wife and children out of the way, when I just fell right onto the platform and the train went by us. I felt something graze the heels of my shoes just as I struck the platform. I heard Mr. Powers hollo-ing when I got on my feet. I did not hear any signal that the engine gave of its approach. I did not hear any noise. No, sir; I did not hear any of the usual signals given by that engine as a warning of its approach. I did not hear anything at all or I would have gotten out of the way of it mighty quick. I had nothing to call my attention to the fact that I was on the track until somebody hallo-ed, "Look out!" Then we made a spring & we jumped and didn't know whether we were jumping towards it or away from it. We might have jumped right in the way and all been killed for all we knew about it. We didn't know which way it was coming. We just luckily hit the right way, but we might just as well have jumped right in front of it, for all we knew. As it was we
were just in time and no more. Mr. Powers was killed. He
53 lived until about two o'clock. I went back to where he was lying. He was lying on the ground, groaning. He was

badly mashed up. His arm was mashed all to pieces, and he was complaining. He was complaining of his hips; they seemed to hurt him more than anything else. He was lying on the ground when I first saw him. I cannot tell exactly how far he was from the place where we first crossed the track to where I went to him, but it was not a great ways; it looked like ten or twelve feet; not more than that, I think. I saw blood there on the track the next morning. I reckon he was lying in three or four feet of the track when I first saw him. I can't tell you exactly how fast the train was running that I got out of the way of and that killed him. It was running along pretty briskly. It ran beyond where I was about fifty or seventy yards, I imagine. Mr. Powers died from the hurt he received that night. He did not die from any other cause or injury than those he received from the train which struck him down that night. As regards the ringing of the bell, I did not hear any bell ring. I never heard any whistle blow. I never heard either one of them. Some one hallo-ed, "Look out! Look out, Missis! Look out there, Missis!" I do not know where that person was standing. I did not see him at all. He must have been pretty close to us. That train went faster than a man could walk. No man could
54 have walked as fast as that train ran. I don't know exactly how much faster it went than a man could walk. It looked as though a man would have to run pretty pert to keep up with that train. I should say he would have had to run pretty quick, indeed.

Cross-examination:

One of my children was about five and the other about seven years old at that time. I was going to Banks county to see my wife's mother. I left Atlanta about 4.40 that evening, I think. I was in what they call the ladies' coach. There were a good many passengers, but as we went along some got off, and by the time we got off there were very few—that is, when we got to Lula. I do not know how many there were. I can't give the jury any idea. I do not know whether there were any ladies except my wife or not. It seems to me there were a few on there when we reached Lula, except my family and Mr. Powers. I can't tell you how many. I really don't know. I think there were about a dozen. It was about eight o'clock at night. It was dark but there was a little light. I don't think there was any trouble seeing after we got out of the cars. Yes, sir; we could see. I did not see the track; don't know whether could have seen it or not. Mr. Powers got out of the car first. I did not see anybody else. When we reached Lula I was sitting about three or four seats from the door. Mr. Powers was right close to me. Mr. Powers got out before my wife. I did not see
55 anybody get out ahead of me except my wife. When I got out on the platform I did not see anybody else, except that I saw some people kind of stan-ing about. They were not people that got off before us. Mr. Powers got off first of all. I think I was on the platform of the car when he got off. I saw my wife get off. I was right under her when she got off the car. Mr. Powers

then was standing right there. He helped my little girl down. My wife had my little girl with her. She is the eldest, and Mr. Powers helped them down. Mr. Powers had a satchel with him. He had one around his shoulder and he had one in each hand; that is what he had. He was a drummer or travelling man. When we got out he handed me my satchel and picked up his own and said: "Let's go to the supper-house," and we all started there. When we got off the train we were about 75 or 100 yards from the supper-house. To go to the supper-house we turned sort of angling towards Atlanta. I did not know that there was a track at all there. I do not mean to have the jury believe that I do not know there is a track there now, but I did not know at the time that there was a track there. I had never been there before. I suppose Mr. Powers had been there before. I knew that I had to change cars there. I did not know that there was a railroad track there. I did not know I was walking on a railroad track. After we started to walk along angling and some one hallo-ed "Look out!" We could not have taken but a few steps before the train passed by us. We could not have gone
56 far—not more than four or five steps. We had just about gone from one track to the other. We had made some four or five steps and had set out for the hotel. Me and my wife were right along together—side by side. That was the way we were when we heard some one hallo-, "Look out, Missis!" We were kind of looking towards Atlanta. My wife was on my right-hand side. My wife had one of the children by her hand and I had the other one. She had the little girl. She held her by the left hand, of course. My little boy was between me and my wife. Mr. Powers was sort of behind me. He was sort of by me and yet a little behind me. He was right close to my side. As I say, he was not exactly just behind me, but he was behind me and by me, too. Of course you know what I mean by that. He was walking just this way. (Witness indicating with two hands.) He was just a little by me and a little behind me about a foot or two. My wife was on my right. I don't know which one of us struck the track first as we walked along toward the hotel, because I didn't know that there was a track there. There was a track between me and the cars that I had just left to go to the supper-house. As we got off it was right in front of us. As we turned to go to the supper-house the track was in front of me. We were going a little sort of angling. My wife was on my right, the little girl on her right, then the little boy, then myself, then Mr. Powers right behind me. I am certain of these positions. Mr. Powers was not
57 exactly following me. I said he might have been a foot or two behind me. I didn't see the track at all. I stopped on it, but I didn't know that there was any track there. I did not see any engine at all. I did not look. I had never been there before and never knew about the track. Walked about four or five steps before the man hallo-ed "Look out!" Then my wife jumped. All four of us got off without injury. I was not looking out for an engine nor listening for one either; did not know that this train met the other train there for supper. I am a shoemaker; am not a rail-

road man and don't travel much. After the man hallo-ed "Look out!" I don't think I gave more than one jump; don't know whether Mr. Powers jumped at all; do not think he could have done so; was not listening for any bell or whistle. It seems to me that if there had been anything of that kind we could have heard it. It looks like we must have heard it. We were just coming along, as Mr. Powers said. The day of the week upon which this thing happened was Sunday. After Mr. Powers was killed we went to the hotel and staid there all night and the next day until about eleven o'clock. Then we went on down to Banks county, to Harmony Grove. While we were at Lula we staid at that hotel. Suppose it was a regular supper-house; m very certain that I stad there that night and along in the next day, until we left the place. I can't say positively when I heard Mr. Powers hallo-.

58 As I said, it was after we had taken some few steps. We must have been then on the track. We sprung from the track onto the platform. I hit it with my toes and then got up onto it at once. The platform was about six or eight inches high; not more. Mr. Powers hallo-ed as I jumped or a little after. He hallo-ed about the time I was getting up and before I had gotten up. He hallo-ed just about that time. I had not got up when I heard him hallo- out. It was no time before I got up; got up right away.

Closed for the plaintiff.

D. P. Chandler. Evidence Read to the Jury for the Defendant.

I am an employees of the Richmond and Danville Railroad company—conductor; was conductor at the time Mr. Powers was killed, on the 11th of April, 1886; was at Lula. I was conductor of south-bound train number 52; don't know exactly what time I arrived at Lula. It was eight o'clock, I suppose—about fifteen or twenty minutes to eight. That was our supper-house for the two trains—for the north-bound and south-bound trains. It was at night. We got there before the north-bound train; about ten minutes before. When my train got there we pulled out opposite the hotel for the passengers to get off for supper. Then we backed out of the way, so the north-bound train could come in. I suppose my train backed out three or four car-lengths. Sixty feet is the length of a

59 passenger coach. My train backed out at least four car-lengths. We staid back there until this other train came in and the passengers got off there for supper. A few minutes before leaving we pulled down again to receive our passengers. Twenty minutes was the time allowed passengers for supper. I went in and got my supper; don't know exactly how long we were in at supper. I was the last going in and generally the last coming out. I generally staid in there to see that all my passengers were out of the dining-room before I left. I was detained longer that night than usual, on account of an old gentleman. He was a little slow and was the last coming out of the dining-room. Then he had to pay his fare at the counter, and I staid and waited for him. I did not want to leave him, and he seemed to be afraid that he would be left,

and I told him there was no danger; I would wait; did not see Mr. Powers when he was killed. Our train came back a few minutes before leaving time to get the passengers. I know it did because I heard the bell ringing. When I heard the bell ringing I was standing at the counter with this old gentleman, and when the bell commenced ringing he started and I told him not to be in a hurry. I know it was the bell on my train because I could see the engine moving and of course I would know the bell. The head-light was burning. When it came down to the place it was
60 moving about four miles an hour, like a man ordinarily walking. There was no light there but that bonfire that they generally had between the train and the hotel. The object of that light was to light the place up so the passengers could see how to go to the hotel and back; saw Mr. Powers, but did not go to him. There was a right smart crowd around him. He was down between the two cars. That was after he was run over; did not see him before. It was about eight or ten minutes after the south-bound train arrived before I heard Mr. Powers was killed. At that time the passengers that came on the south-bound train were in at the hotel eating. Some had been in there before Mr. Powers was hurt. When we went back to the train I heard some one say that a passenger was hurt. At the time the south-bound train pulled down, now, my passengers were in at the hotel. They had been in there some six or eight minutes before my train pulled down. (Q. I mean passengers that came up from Atlanta—north-bound passengers?) They had been in there some five or six minutes, some of them—that is, before my train pulled down there. I suppose the track on which my train pulled up to get the passengers is about 200 feet or 300 from the hotel. The ground between the hotel and the track is tolerably level. It is what you would call level. This torch-light lit up the way from the hotel to the train. You could see anything.

61 Cross-examination:

On that night I was in at supper, I suppose, fifteen or twenty minutes from the time I went in until I came out. I could see my engine from the counter in at the hotel; could see it through the door and big window that are there. The door and window are not towards Gainesville. They are fronting the railroad. The counter is on the side of the room towards Charlotte; the door is about the middle of the room and the window is a little towards the door, on the same side of the counter. I could see the engine coming up through the door. The window was open and I could see through the window. I was standing at the counter. My engine, as regards the door, lacked a little of being opposite the door when I saw it coming up through the window. I could not say that the engine had already run over Mr. Powers when I saw it. Mr. Powers, when I got out there, was nearly in front of the door. The engine run to its usual point before it stopped. I never noticed that night. It run up to its usual place of stopping; it run until the passenger cars were nearly opposite that crossing. At the usual place of stopping the

coaches are very nearly opposite the hotel; that would throw the baggage car and the engine a little in advance—this side of the hotel, towards Gainesville. It would not take but a very few seconds for me to go from the counter down to the train by myself, but on
62 account of this old gentleman I walked a little slowly; not more than a minute or two. Don't think that man had been run over more than a minute or two. When I first saw him he was down between the track. Other passengers had gotten there and he was sitting up. There was a crowd around him and I thought it best for me to move out of the way. I told Mr. Landrum to take care of him and see that he was cared for, and I would move my train out of the way. Mr. Landrum was division master. There was another engine there at the time, and there was a baggage car, express car, and postal car below the hotel, standing below where mine was standing; I mean towards Charlotte. They were both passenger trains. The sleeper was not opposite the hotel. The sleeper was standing back a little, between Gainesville and the hotel. That would throw the first-class coach about opposite the hotel. Did not see any commotion the first time I noticed my engine. Mr. Powers was on the opposite side of the engine from where I was. At the time he was struck there must have been a train between us. At the time I saw the train I would not have noticed, and would not have paid any attention to the passengers walking around the engine. Could not tell you where Mr. Powers was at the time I saw the engine. Did not know that Mr. Powers was on the train, and did not know that any one was hurt. Could not see him at that time. The train was between me and Mr. Powers
63 at the time when I heard he was hurt. This pine-knot light I spoke of is kept up by the hotel for the passengers. It is out there some little distance from the track—about midway between the track and the hotel, right near the sidewalk. Could not tell you whether there is another eating-house there or not; there may be for all I know; whether there is an eating-house there or no, I could not say; I would not say; I don't know that there is; I never was in it.

Redirect examination:

The main track is the nearest track to the hotel. My train, No. 52, was on the main line. When the north-bound train from Atlanta got there it went into the side track. The side track starts in between Gainesville and Lula. They pull in on that side track. That track is further from the hotel, and that is the reason why the north-bound train let my passengers off, and then I backed back to let these north-bound passengers off.

H. D. Spinks' Evidence Read for the Defendant.

I am a locomotive engineer; have been one for seventeen years. I live in Atlanta; am on the Air Line road now; have been running there about six years; was running on the Air Line road, on engine train No. 52, coming south, on the 11th of April, 1886, the time when Mr. Powers was killed; was running the en-

gine myself that struck him. Charles Spinks, my son, was
64 my fireman. After we got to Lula and the passengers got off I backed back far enough to let the other train pull in, so their passengers could cross over to the hotel, and remained back there until the mail was changed from one car to the other and until the passengers got through supper, and then came out and came ahead. I had backed up there about four car-lengths—between four and five—and moved the same distance, to get to the place where the passengers were to get on. The head-light on the engine was lit; was moving my train about four miles an hour, not exceeding five. That is about an ordinary walk for a man—four miles an hour. The bell on the engine was ringing. The fireman was standing on the foot-board of the engine ringing the bell; was sitting on my box at the proper place; did not see Mr. Powers; I was looking right out in front; could see the track in front of me. There was a light about the hotel. The light was burning between the road and the hotel. Don't know at all when I struck Mr. Powers. I run from the place where I afterwards found I had struck him about the length of two cars and about the middle of the third car. I did not try to stop before that; did not know at the time I stopped that I had run over Mr. Powers. The baggageman came to me off the north-bound train and says, "You killed a man." I says, "Surely not me." He says, "You did." I got off then and started back, but did not go close enough
65 to see; don't know exactly how far the tracks are apart, but they are pretty close together. I suppose about eight feet between the cars. The cars bear over the track some, and that would make it about ten feet; could not see a man right by the side of the track on the left because the length of the engine—our position is right at the back end of the boiler, and that throws the whole boiler out in front of us. That is higher than a man on the ground; that is about eight feet. Going from Atlanta the hotel is on the left-hand side.

Cross-examination:

I had finished my supper. Yes, sir; I had my cars about five car-lengths back. They were passenger cars. Some are sixty feet and some are not. That would put it about 300 feet back. The baggage car is the next car after the mail car to the engine. The next to that is the second-class car. Next to that is the ladies' passenger car. My engine passed where you turn off to go to the hotel about two car-lengths—about 120 feet. That would put the second-class car in front of the hotel. The usual place for the engineer is on the right-hand side. The usual place for the fireman is on the foot-board of the engine. There is a place for the fireman like for the engineer. He can see the rail about twelve or fifteen feet in front. I could not see the rail right at the engine; could not see it closer than eight or ten feet; could not see the left-hand side that close; could see the left-hand side about sixty
66 feet off; fireman was not upon the seat looking out; nobody was looking out of his window. From where he was you

could not see out hardly at all. He could not see anything where he was. I could not see the rail because of the dome of the engine; could see anything on that side that was higher than the bumber. The same would be so on the fireman's side. The engine and car project about a foot over the track. I don't think the car was but a very little over.

Redirect:

The proper place for the fireman is on the foot-board of the engine. He was ringing the bell at the time Approaching stations, they almost always sit upon the box, but on leaving the stations they are fixing fire and commencing to put in coal; that is the only place he can do his work. There is a box fixed up there for him to sit upon when he has nothing else to do. On this occasion he was down on the foot-board ringing the bell. The foot-board is between the back driving-wheels, right on the floor on a level with the tank. Standing there he could have seen out, but he could not have seen the track. It would take about sixty feet to see a man on the left-hand side. The fireman could not have seen a man at all. He could not have seen the rail. The whole engine was right in front of him. He could have seen a man walking along the sidewalk two or three feet from the track. There were two men on
67 the engine—engineer and fireman; that is the custom except on long runs. They have two firemen on long runs, so one could go back in the coach and rest awhile. Only two men on the engine at the same time.

Recross:

The fireman generally fixes his fire and when I shut off for station he gets upon his seat. He can't stand upon the foot-board and lean out far enough to see anything. This seat or box is about 18 inches above the level of the foot-board of the engine. After the fireman fixes the fire he has got to get underneath the engine and rake out the ash-pan. They shake the fire pretty well and get the gleanings into the ash-pan. He was just finishing up that. They clean it once from Charlotte to Central. Sometimes it takes twenty minutes and sometimes he can do it in five. He did not go to supper; he was at work. Twenty minutes is not long enough to do the work in. Sometimes twenty is long enough and sometimes an hour. If it had taken an hour, would have been compelled to have stopped. He was not working at the time of this accident. When they signed me ahead he commenced ringing the bell. There was nothing to keep him from getting in the window and looking ahead except neglecting his work. It is not his business to get in the window and look out. It was his work to ring the bell; that was the time he was in the discharge of his duty. A man looking in the
68 furnace is just like looking at the sun and looking off. He could not have seen a half dozen men for a moment.

C. L. Spinks' Evidence Read to the Jury for the Def't.

My father is the witness who has just left the stand. I was firing for him; am working for that road yet; was at Lula the night Mr. Powers was killed. After we arrived at Lula I staid on the engine; was filling up oil cans and cleaning the fire. I cleaned the fire by shaking out the cinders and raking out the ash-pan. It generally takes about five minutes to do that; don't think it ever takes longer than that. When we started down to get the passengers I was ringing the bell. I was on the left-hand side of the engine; could see out in front of the engine from the foot-board. I was ringing the bell and looking out. I could see four car-lengths ahead, I reckon. The nearest up to the engine I could see would be about fifteen yards. A man could be seen standing on the track about twenty feet, I reckon. You could not see a man at all unless he was right in front of the engine. Did not see Mr. Powers on this night. Did not see anybody on the track. If I did see anybody step on the track, I don't remember it. My train was moving about 4 miles an hour. A man could walk it easily. The head-light was burning. Don't know how far we ran after Mr. Powers was hit by the engine. Don't know exactly where he was hit. Did not go beyond the usual place of stopping. We stopped at the usual place.

When we stopped the second-class coach and the ladies' coach
69 were right across from the hotel. Do not remember whether any of the steam was escaping or not. Did not hear anybody hollo, "Look out!" We generally lit the head-light at Central. Central is sixty-six miles from Lula. It was my place to light it and I did it. The steam escaped out of the whistle valve and also from the cylinder cocks; that is right down by the wheel. Don't know whether they were open or not. After the engine stands a while it is customary to open the cock. Some men open the cocks and some don't. Don't know whether they were open or not.

Cross-examination:

I cleaned out the ash-pan, then filled up my oil cans. Going on down to the place to get the passengers I was ringing the bell and looking ahead; that is all I had to do. It is not my business to look ahead. I have got nothing to do with looking ahead at all, but I was looking ahead that night.

A. W. Altman's Evidence Read for the Defendant.

Am on the Atlanta and Charlotte road now. Am baggage master. I held the same position the night Mr. Powers was killed on train No. 52—south-bound train. I was at Lula. I ate supper there. After I got through supper I walked out in front of the hotel, down close to the track; no one with me when I went out. I met
70 Mr. Dunlap directly after I went out, near the light they had there in front of the hotel. This is a light of pine knots for the benefit of the passengers going over to supper. I saw train No. 52 when it pulled up. It was coming about four miles an hour.

The head-light was burning. The fireman was ringing the bell. I know that because I heard it. The baggage master was talking to me and wanted to tell me something important about a letter he had. We couldn't hear very well where we were standing, so we moved back a few steps; as the engine was making so much fuss, we stepped back a little bit. The steam from the engine and the bell ringing made the noise. I saw Mr. Powers; he was coming like he was coming to the hotel. He was walking towards Atlanta down this way, until he got to a place to cross over. Before he crossed I saw him about 25 or 30 yards; wasn't any one with him. He had a couple of sample cases in his hands—one small one and one large one. I never saw a man with two children with him. They were not with him. The head-light of the engine was burning and there was a bonfire in front of the hotel, and I could have seen them if any one had been with him. The engine was moving south. It was a right smart piece from me. The first I saw of anybody at all was Mr. Powers. He was walking this way, close to the main line. He was coming right along by the side of the main track when somebody holloed to look out, that the train
71 would run over him. The next thing I knew it struck him, and that is all I could see. He never paid any attention at all to the halloing. It was a very short time after I holloed to look out before the engine hit him; did not look like to me he went more than two or three steps. He seemed to go across the track right in front of the engine. He was on the right-hand side of the track, going north, and had to cross the track to get to the hotel. He was close to the rail of the track when the engine hit him—by the side of the track; don't know about it knocking him off—it never knocked him off. It threw him on the opposite side from me, and the engine got between him and me. I jumped across and went to where he was. He was about the length of a car from the place where the engine hit him; don't know how he got there; looked like he was dragged there. I think the pilot hit him. When Mr. Powers was walking down the track he seemed to be looking at something in front of him, just like a man walking along with nothing particular in view. I suppose he was about fifteen feet from me; not over that. There was a good light there. I never saw a soul but Mr. Powers. If there had been a woman and two children who rushed across the track just before the engine hit Powers I would have seen them. I never saw them.

Cross-examination:

72 I moved back to a place to avoid the noise, so I could talk; was still there when the train struck Powers; do not know that the light was over 150 feet from the track. It was not very far from me to the rails.

(At this point Mr. Glenn stated that he wanted to ask the witness a question he had forgotten.)

Q. Did you go to Mr. Powers?

Yes, sir; I talked with him. I heard some one say he died

about two o'clock in the morning. He seemed to think and talked like he was going to die. I was the first man got to him. He was perfectly conscious when he said what he did. I think Mr. Dunlap was the second man who got there. I am not positive. Don't know who heard this conversation with him besides myself. If anybody heard it, it must have been Mr. Dunlap. I just jumped across the train to him. (Mr. Glenn stated that he wanted to ask the witness what Mr. Powers said about the accident. Mr. Smith objected. Objection overruled.) When I got to him I helped him up the first thing and asked him how it was he was so long in getting over to the supper-house and how he came to let the train run over him. He said he had come up on the north-bound train and had waited a good while for the porter to come from the hotel after my sample cases, and as no one came he decided to carry them to the hotel himself. I says, "Did you not hear the bell ringing and the
73 people halloing? Why did you not look out?" He says, "I thought they were holloing at somebody else." He said it seemed that his wife begged him not to leave home that evening, and that seemed to be his doom; that he could not go to Harmony Grove, or wherever it was he was going; that he could not leave there on Sunday night; no train was going Sunday night, and it seemed it had to be that way. Those were the identical words he told me. He said he lived at some number on Broad St. That is all I remember of.

(By Mr. SMITH: How far do you call it from where you were over there?)

It is about fifteen or twenty yards. He was very near to the place when he turned out. It was not very far from that walk up to the hotel. He was on the right-hand side going north, south of the crossing, ten yards from the crossing and towards Atlanta from it. I really can't say how far the tracks are apart. I don't know. I suppose ten feet. The north-bound train must have been about two car-lengths above the crossing. I saw him directly after he got off the north-bound train. Think he got off between the smoking car and the ladies' car. He got off all by himself. Never knew him before. He looked like a man who did not know where he was going. He was looking straight in front of him. That is the only way I could describe it; that is the only thing by which I judged that he was not paying attention. I could not tell you all about his
74 looks. He had got off the car and was coming down to the place where he was to go to the hotel, with his satchel in his hand. I holloed to him to look out, and he kept right straight on. He was walking in an ordinary gait. When the engine caught him he was about at the crossing. At this time I was standing by the bright light from the pine knots. I first got down close to the track, but the noise of the train made me go back. It is not over one hundred feet to that light, according to my recollection. We stepped back to about 100 feet. I saw Mr. Powell before I got to the railroad. I saw him as he first got off the cars; don't know how far he was from the crossing at that time; don't know what car he was opposite—just seen him coming; must have been half way between

the smoking car and the rear end of the ladies' car. When I was back at the light he must have been about far as from me as that door over yonder. It is not much over one car-length to that door. I guess he was about two car-lengths off when I first saw him. The engine run down to the post where it generally stopped. The baggage car was left opposite to me. I got across between the mail and the baggage car. I did not do anything to stop the engineer; did not have time to call to him. Before the engine got to us none of us thought the man was going to cross. I could not stop the
75 engine, because I did not know the man was going to cross. It would have been no use for me to speak to the engineer after he had already hit the man. The pilot hit the man, and I never said anything to the engineer. I never thought of it. I was excited when I saw the engine strike him. I jumped across while the train was in motion and went and picked the man up.

C. W. ASBURY sworn for the defendant:

I live in Lula; am a merchant and the postmaster; was at Lula on the 11th of April, 1886; was there the night Mr. Powers was killed; was there at the time and before the accident happened. I remember the time when the south-bound train pulled up to get the passengers who were in at supper; did not notice it more than any other train. I heard the bell ring to start just as I was talking to some man—I don't know who now. I can't say that I heard any other signals given or whistle blown. There might have been and I not heard them. That train went about as fast as a man could walk—as fast as I could walk. That was the rate it always went at.

Cross-examination:

Don't know how far it is from the railroad track to the hotel; expect it is about 150 feet, just guessing at it. The crossing there is right in front of the hotel. Then there is a wagon crossing also. This crossing is right where the passengers get off and go to
76 the hotel. Then there is a regular road crossing. It is called Athens street. To the best of my recollection, the hotel light was placed between the place where the passengers get off and the hotel itself. They had some sort of a pine-knot light there. This was somewhere between the hotel and the railroad—not always in the same place. They generally put it in about the same place. It was about half way between where the passengers get off and the hotel porch. Where the passengers get off it is level. There is a wagon-crossing there. It is all perfectly level. The dirt is ballasted up to the top rails, and you do not see any cross-ties. I believe there was a plank platform there at that time, but the space between the rails was level and smooth. I do not recollect telling Mr. Simpson that the bell might have rung just as it started back. The town was not incorporated then, but it is now.

A. J. VICKERS sworn for the defendant.

I am agent for a guano company; am not connected in any way with the railroad company. I think it has been since the ninth

day of May, 1886, since I was in its service. I was at Lula when Mr. Powers was killed; believe it was the 11th day of April, 1886. I was conductor of No. 51. That was the north-bound train. I think we arrived at Lula a few minutes before a quarter past eight—eight fifteen was our time for arriving there in the afternoon. I had several passengers, but it is a hard matter to tell how many
77 passengers I did have. I had some lady passengers. They were Mrs. Smith and the wife of one of the conductors; had no other lady passengers that I know of. I cannot say that I remember a lady and her husband with two children. They may have been there. There was a lady, but I cannot say who I saw her with. I remember Mr. Powers; he was in the second-class car. I remember his being in that car because the circumstances called my attention to it. I remember his being with me in the smoking car. I cannot say in what car he rode from Gainesville to Lula. When I reached Lula I helped my passengers off—that was our supper place—and I told them how long we had to stay. They were between the second and first-class cars. Saw no ladies then, but saw Mr. Powers. I remember Mr. Powers because I saw him when he was hurt. Did not see him when he got off. Under ordinary circumstances it would be hard for a conductor to know all the passengers and remember about their getting off and all that takes place unless something special occurs to call attention to it. We have a rule in the rule books that when an accident occurs the conductor must make a note of all the occurrences which surround it, which note I made. I cannot say I saw Mr. Westbrook. I have tried to refresh my memory. I knew Mrs. Smith because she was the wife of a railroad man. Think if there had been any other ladies on that train I certainly would have noticed
78 them. It was unquestionably my duty to aid this gentleman and his wife. Saw Mr. Powers after he was hurt. At the time he was hurt I was about the baggage car. Did not leave my train to go to supper, because 52 leaves on the arrival of 51; when I reached Lula my train was on the main-line track; did not see 52 when it started down; at that time I was in the baggage car transferring my tickets to the next conductor; cannot remember that my attention was directed to 52 moving down. I know I was busy about my own train. Saw Mr. Powers after he was hurt and asked him how it happened. He was suffering so he could not talk. Think he had only one sample case with him; he may have had two or more. It was between five and ten minutes after my passengers got off before Mr. Powers was hit by this engine; suppose it would take a minute or so after my train came to a standstill for the passengers to get off the cars and go to the hotel; they had plenty of time to do that before 52 came down. Mr. Powers was going to Lula to remain there over night.

Cross-examination:

Deceased had a thousand-mile ticket. We don't punch thousand-mile tickets. I could not say positively whether he was going to Harmony Grove or not. I was a conductor and had been a con-

ductor about six years. I have run many a trip and carried thousands of passengers, and it is impossible for me to remember
79 just who was on my train on any one trip; could not remember them unless there was some special cause; there was nothing connected with Mr. Powers and there was no reason why I should remember especially who was with him on that trip; there was nothing that had any connection or reference to the number of ladies that were on my train; the fact that Mr. Powers was injured would not have been effected either way by the number of ladies on the train. I remember accidents, &c., because we have to make a written statement giving all the facts in the case; that is one of the rules. We make a statement under oath. They do not necessarily swear me to it, but they bind me to it. We do not swear to it unless it is true. So far as my memory serves me, there was nothing to indicate that there were or not any ladies on the train, nor of the number of men. I made a statement of the circumstances connected with the death of Mr. Powers. Did not know positively that Mr. Westbrook was not one of those men; there is nothing on my mind that will show that Mr. Westbrook was on that train. Mrs. Smith being a railroad man's wife I noticed her, but did not see any other lady on the train, to the best of my knowledge. Mr. Powers got off and went right on towards the hotel. He was on the inside track going south. He had not been off the car long. He was right where a man could have been who had just gotten off the train as soon as it
80 stopped and started in that direction. His back was towards the train coming from the north. The end of the car I got off was some sixty feet from that crossing where you turn to go to the hotel; don't know whether there was a sleeper there or not; don't know how far he was from me when I first saw him. He was about twenty feet. He was about the middle of his coach when I saw him. These coaches are sixty feet long. I saw the engine strike him. It seemed to push him down on his side, and as soon as he was struck he seemed to roll over and over for about 30 or 35 feet; then the wheels ran over him. He went as far back as the front end of the middle car, where we took him up. The engine, including the tank and tender, my recollection is, is about forty-five feet long. The baggage and mail car is about thirty feet long. Alman was the man that pulled him out from under the car. I think the first man that got to him, Mr. Walker, a passenger on my train, might have been the man that got him out from under the cars; I am not certain; don't know whether the baggage car or mail car was next to the engine at that time or not; don't know how many people were between those two cars at that time. It was a right smart crowd. A car extends over a rail about two feet. The rails are about ten feet apart between the track. The cars extend about two feet over the track, and that would leave about six feet to stand in there between those rails. This walk was a regular passway
81 to get to the hotel. That was the only way they were expected to go. There was nobody with Mr. Powers when he stepped on the track.

WILLIAM B. NEW sworn for the defendant:

I am a conductor on the Richmond & Danville railroad; was conductor on that road in April, 1886, and also at the time when Mr. Powers was killed. I went then on 51; 51 is the north-bound train; I went to Lula on that train; saw Mr. Powers just about the time he stepped on the track in front of the engine. I was standing between the main line and the side track. When I saw Mr. Powers he was going in the direction of the hotel, going in a kind of angling direction. He was walking along this way when the engine struck him, and I shouted to him. He had just stepped inside the rail and had gone in an angling direction about five or six feet and was right in front of the engine. It was night time, and the engine of 52 was going south in the direction that he was going. I watched him until I saw the engine was getting very near to him, then I holloed out to him to get out of the way. He never seemed to notice it. In about a second it struck him and knocked him on the inside of the rail and on the same side he was walking on. He could not have got past the center of the pilot. The pilot hit him and rolled him over and over about thirty feet. The bell was ringing on that engine at that time and the head-light was burning.

82 The train was moving but very little faster than a man could walk. Between these two tracks the ground is a little bit higher than the rail. The character of the ground around there is composed of something coarser than sand. It makes a very hard, smooth surface. It is smooth; no bumps at all.

Cross-examination:

I should say these tracks are about eight feet apart, and the surface of the ground is smooth and hard; it is ballasted and is a hard surface. The surface is the least bit rolling. I am an employé of the railroad. It is about level with the top of the rail; can't say who was the first person that got to Mr. Powers after he was hurt; it might have been Mr. Stewart or the baggage master, Mr. Alman. I went to Mr. Powers as soon as I could. I had just gotten there and was standing there looking around. I had not been there but a few seconds; had not intended to stop. There is nothing that makes my recollection fresh on that subject. If there had been any other lady on the car she would certainly have been in the same car with Mrs. Smith and I would have known it. I don't mean to swear Mrs. Westbrook was not on that train. I never saw her. I will not swear that I never took up her ticket, but I will swear I never saw her to the best of my knowledge. I won't swear that she and her husband were not on that train; they might have been on there. I was making this transfer with Mr. Kirkland, a freight conductor.

83 He was to take the train back to Charlotte. I remember that I put a little boy off that evening for trying to beat his way; that was between Atlanta and Lula, but I do not remember the exact station.

J. B. DUNLAP sworn for the defendant:

I am a baggage master on the Richmond & Danville railroad, between here and Charlotte; have been in that business about four years; was at Lula the night Mr. Powers was killed; went there on train No. 51, a north-bound train. Mr. Vickers was the conductor. I went through the train before we got to Lula; did not see Mr. Westbrook, his wife, and two children. There was only one lady in the ladies' car that I know of; that was Mrs. Smith. When we got to Lula we went on the side track. I always have something to do, and on that night I finished my work and started to supper. I went to hunt the baggageman of No. 52; his name was Alman. I had a very important letter when I left Atlanta for Mr. Bean, who was at Gainesville, and if I did not find him between Atlanta and Gainesville I was to leave it at Gainesville. In going to supper I passed Mr. Alman. In the meantime No. 52 commenced to pull down, and they were making such a noise it was almost impossible to cross and all conversation had ceased between us until the engine passed. Just at that time this holloing commenced and the engine went by and had passed before I told Alman. I spoke to Alman first, but the engine caused such a noise with the steam letting off and the bell ringing I could not explain to him what I wanted to about the letter. The bell was ringing on No. 52 as it came down. The head-light was burning.
84 Mr. Alman was standing on the walk between the hotel and about opposite the platform, about half way, or not exactly half way; but there was a target-light burning there, and he was just alongside of that light and next to the railroad. While standing there with him, waiting for the engine to pass so I could tell him, the killing of this gentleman occurred. We were then talking and looking in that direction, along with several other gentlemen. First saw Mr. Powers after he got off the train; had seen him before travelling up and down on the road; can't say how frequently I had seen him, but quite a number of times. Between the time he got off the train and the time I saw him he was walking on the road in between the side track and the main line. No one was with him. He had three sample cases. He was not walking with an old gentleman, lady, and two children. Mrs. Smith was the only lady around there. She got out after Mr. Powers was hurt. Powers was walking down the track. The cross-ties there are buried in the ground. He was walking very close to the rail; suppose he was about ten feet in front of the engine when he first stepped on the track, then he started to cross the track almost on a diagonal with the track line, and it was then and there that Mrs. Smith shrieked out from the car. Quite a number of gentlemen holloed. Powers did not appear to be in a condition to know anything—just kept on walking. It was hardly a second after he stepped on the track before the engine struck him. Had his back to the engine
85 and the train was coming this way, towards Atlanta. He had not got to the middle of the track. The track is about four feet wide. Engine was not moving over four or five miles an hour;

not over five. It struck him upon his leg and knocked him to one side of the track; that threw him on the inside and next to the side track, and the blows he received then made one or two scars on his head; don't think the wheel ran over his leg; don't know how far it pushed him. It was dark and I could not see everything.

Cross-examination:

I was on No. 52, north-bound train. I was on the platform and saw the passengers. There were about four or five; did not see anybody walking in between the tracks at that time except Mr. Powers; don't know what men were standing at the end of the car; did not see a single man between the two tracks as I ran across. I did not pass Mr. Powers; did not see him until I got to where Mr. Alman was; did not see him get off the car at all; was about where the basket of fire was; passed Mr. Alman and went back to where he was; he had walked up to the platform and stopped. I joined him at the platform and started to tell him about the letter. We did not move back at all of the platform. We staid right there, in order to let the light fall on this letter. Powers was about opposite the first-class coach, towards the end of it, which was towards Charlotte; don't know how far he walked, as I did not see him until he had — within about ten feet of where he was stricken; did not
86 take over two or three steps on the track after he got onto it. His back was to the approaching engine. He had taken five, ten, or a dozen steps altogether; cannot give the exact number. I was looking at him all the time. When this lady holloed out he was about five or six windows from the front end of the first-class coach. At that time I don't know whether he had taken half a dozen steps or not. Don't think he could have taken half a dozen, in fact. Suppose he had taken three or four steps altogether when the engine struck him. He was walking at a very slow gait, with his head down. Had his sample cases with him. It was not easy to see the rails; the ground was very smooth over the cross-ties. Don't know that the ground was higher in the middle than the rails. He started at the beginning of this platform and went along down it. Can't say exactly where he was with reference to the platform. There was a platform on both sides of me. I was standing at the crossing. I was on the walk beyond the hotel. Suppose Mr. Powers was fifteen or twenty feet towards Atlanta, from the end of that platform. The engine struck him and cut his leg and I think it ran over him; in fact, I am certain it did. I was standing just where I said, and as soon as the engine struck him I saw him fall. Alman and I ran at the same time. We ran over to him, about the middle of the car, where he was lying. We started in a run. He was about fifteen feet from us; maybe a little more. It was about the end of the platform; that would make it about
87 18 feet. Train was only going about four miles an hour. Did not speak to the engineer, because he could not hear me. Suppose I did not motion him, because I was excited. Don't know whether there was any doctor around there or not. There was not any flagman around the train. I did not notice and did not see

any. Think the train pushed Powers about thirty feet, from the marks on the ground; did not stop to measure it. I saw Mr. New. When I first saw him he was bringing over some quilts and blankets. Mr. Powers was about five steps from the north end of the passenger coach. If Mr. New had gotten there I could have seen him. I did not see him there. Cannot say how many persons were on that passway between these two cars. Mrs. Smith was in the ladies' coach, but she was close to the end towards Charlotte.

Redirect examination:

Did not run straight across the track because my car was way up to the top, and I ran that way because it was the only way for me. I had crossed over before I saw Mr. Powers. Did not notice him before I had crossed. Was on the side next to the hotel when I saw him. When I saw Powers I don't know how far he was from the crossing, exactly. Don't know how wide that crossing is—the number of feet. There is a crossing there, but I don't know that I could describe it to you. You can cross that railroad for quite a length of distance; you can walk anywhere about that railroad along there. There is a regular place there for crossing. I crossed
88 about forty feet from the end of the platform; it was about twenty or thirty feet from Mr. Powers when the engine struck him. After Mr. Powers was struck I crossed on the mail car. Did not run in front of the engine because I did not think it safe to do so.

WM. B. NEW recalled for the defendant:

The platform that the passengers got of- on was between the main line and the side track. It is true that between the two tracks the surface is level. The rails are about four inches high; I mean the rail is about four inches higher than the dirt is in the center of this track which comes even with the top of the ties.

C. W. ASBURY recalled for the defendant:

As I went down the back track I saw some man picking up a valise or valises, as many as he could carry, and some man standing on the bottom steps of the car; looked like he was in conversation with him; I could not swear that it was Mr. Powers. Did not see Mr. Westbrook and his family. There was no woman and children there, sir; I would have seen them if they had been there.

Cross-examination:

I saw these gentlemen in conversation, but do not know whether there was a man coming out of the door of the car or lady or children; they might have been in the car for all that. Did not notice what kind of a looking man this was in conversation with the other man on the steps.

JOSEPH LANDRUM sworn for the defendant:

I am a division road-master. In April, 1886, was living in Lula. Hold the same position now I held then. Was present the night
89 Mr. Powers was killed; saw him after he had been struck; saw him in the act of falling backwards; was standing directly in front of the hotel; suppose I must have been about fifty feet from the engine that struck Powers. Cannot say positively that the bell was ringing. As to whether the head-light was burning, will say this: If the bell had not been ringing or if the head-light had not been burning, would have been more than apt to have noticed it; it is customary to ring the bells, and I think I would have noticed it. The train was going very slow, about the rate of speed that a man could walk; it may have been a little faster. Powers fell on the pilot of the opposite side of the south-bound train. The blow-post stood directly in front of the hotel and I was standing right at that post. These post- are put up all along the line of the road, so as to show where to stop the baggage and express car. It means for the engineer to stop directly opposite to it. It had nothing to do with the controlling of the stopping of this engine for the eating-house; it was only to blow for the station. The post was moved next day because they had been hauling an extra car on 50 and 51. I had gotten my verbal order to move it perhaps several days previous to the time this accident occurred; this accident had nothing to do with the moving of the post.

Cross-examination:

The post was on the same side of the track as the hotel. At the time Mr. Powers was killed it was placed some distance
90 beyond where the engine stopped. The engine pulled down in the neighborhood of where they put the post next morning; it was pretty early next morning when the post was changed. I moved the post down where the engine did stop; suppose the post was fifty feet above the crossing that went to the hotel where the engine struck Powers—that is, towards Charlotte; after the train struck him it run from 100 to 120 feet; don't think the engineer heard anything that was said, although several parties holloed out about the same time; don't know where the conductor and train hands were at that time; did not see any of them in front of the engine; don't know how many persons were standing between me and the track that the train came down on. I was engaged in conversation with a man, and did not notice anything until I heard some one hollo, "Hello!" When I saw Powers he was all covered with dirt, and bloody; don't think I looked at anybody else but Powers; the sleeping car of the north-bound train must have been about opposite where I was standing. I went across to Powers after the accident. He was lying about opposite the front of the postal car, on the east side, on the opposite side of the track where I was standing. Have had no experience in using air-brakes, but have watched passenger trains stop; a train can run at the rate of five miles an hour and stop in thirty feet; don't know whether they can stop quicker or not, but they can stop very quickly when moving at

that speed. I did not see any blood where I found Powers. I
91 went across between the baggage car and the second-class car or between the postal car and the baggage car, I am not certain which; don't remember who was there when I got there, but think Mr. Alman and Mr. Dunlap were there—these two baggagemen.

J. D. NUNN sworn for the defendant:

I live in Richmond, Va.; when the interrogatories were taken I lived in Alabama; was present at Lula on the night that Mr. Powers was killed; I was on my way home to Richmond; am a carpenter. I got to Lula about eight or nine o'clock. I remember seeing Mr. Powers; became acquainted with him on the cars. I was sitting about the middle of the coach, sitting right across from him; there were others on that car—two or three gentlemen and a lady; there was only one lady; don't think she had any children with her, but will not be certain; think her husband was along with her; will not say for certain about the children, because I don't recollect; did not see what kind of a gentleman was talking to Mr. Powers. Mr. Powers was about opposite me and about the center of the coach. The lady I saw did not get off at Lula; Mr. Powers did get off; don't know who got off after Mr. Powers; the lady I speak of did not get off with him. I went out to the door with Powers. He had some sample cases with him. He sat them on the ground a little while and seemed to be in a deep study; seemed to be waiting for the porter to come and take his sample cases over to the hotel; did not see any other passengers with him. He waited
92 about five minutes and walked off in the direction of the hotel. He staid there at my car until the south-bound train pulled out. He then started to cross the track in front of the engine and was cut down and run over. The train was coming very slowly. I heard the bell ringing. There was a bonfire on the other side of the track. Mr. Powers was about four feet in front of the engine—about ten feet from where I was standing; don't think he had taken more than one or two steps when the engine struck him. Heard alarms given. There were shouts and the bell rang and the train made a noise. I went to where he was after he was struck. Heard Powers hollo out, "Oh, my arm!" Powers was walking by himself and he seemed to be in sort of a study, as if he was thinking about something. As Powers walked along there did not see with him a middle-aged man and lady and two children. Most certainly I should have seen them if they had been there.

Cross-examination:

Don't think there was but one more gentleman there, and he was the conductor of the sleeper. There was no gentleman there who had just stepped out of the second-class car; would have seen such a man if he had been there. When I first saw Powers he was standing on the platform just across—just beyond the track of the south-bound train. I did not go to the hotel to supper that night; can't say exactly how far the car carried him, but it pushed him along

between a half and three-quarters of a car-length; I was ex-
93 cited; think his body was about the middle of the sleeper. I did not go to him. I think it pushed him about a car's length. I was not on the sleeper. It was attached to the car I was on. He was carried about ten or fifteen feet. He was opposite to the sleeper. I am sure of that.

Redirect examination:

I was standing opposite to the sleeper. He asked me if I was there. My recollection of it is he was under the sleeper. I told you all I know about it.

Mrs. A. B. SMITH sworn for the defendant:

My name is Mrs. A. B. Smith; my husband's name is Romulus Eson Smith. He is a conductor of material train No. 2 on the Air Line railroad. In April, 1886, I lived in Toccoa City. I remember the night that Mr. Powers was killed. It was in April, somewhere between ten and fifteenth, but I think it was about the tenth or eleventh. We were on the train going to S. C. that evening. Mr. Smith, the children, and I, we were all going there together. We got on at White Sulphur Springs. I think that it is about six miles from Lula. When I got on the train I got on the first-class coach, the ladies' coach. There were not a great many passengers in that car; don't remember seeing any other lady at all. I had three children with me. I was sitting about the middle of the car and remember very distinctly seeing Mr. Powers; saw him talking to a
94 gentleman, but do not think he talked with him over a few minutes. He was a nice-looking gentleman. He looked just like any other gentleman.

(At this point Mr. Nunn was requested to come into the court-room for identification by the witness.)

Don't know for certain whether that gentleman (Mr. Nunn) was the man, but he looks very much like the man; did not get off the train when I reached Lula; did not change cars at all. I did not get off to go to supper. Mr. Powers got off and was going to the hotel to get his supper, but he waited until all the passengers were out. I remember this particularly, because he was going out and I was going to remain on the train. As he passed by me he looked down at me and I noticed him particularly. My husband went to get off along with the other gentleman, but I am not positive whether he got off before my husband left the coach or not. Mr. Powers had a valise in his hand—one or two of them. I saw the train when it struck Mr. Powers. I saw the train when it pushed him over. He was not very far from the engine when he first stepped on the track. The engine was going slow and Powers was walking slow and he did not seem to notice anything. The engine pushed him over and yet kept on pushing him some distance. No one was with him as he was walking along. It was a pretty clear night; in fact, it was bright; did not see a gentleman and lady and two children with Mr. Powers that night. I am certain of that.

A. I don't know, sir; there was a question asked me just as I stepped into the car. It was a question asked me by a gentleman, and I replied to him. Can I go on and state what I said?

99 (The COURT: "No, sir; you need not say that.")

My recollection is that the bell was not ringing; as well as I can remember, the bell was not ringing.

Cross-examination:

I was in the smoking car when the accident happened. There were three or four other gentlemen in there. I was just sitting there talking. Don't remember now what I was talking about. I heard deceased hollo. When I heard him hollo I ran to the door as quick as I could and got out. I was on the down train, in the smoking car. I knew these four gentlemen with whom I was talking. Don't remember what I was doing just at the time.

GEORGE W. SMITH sworn for plaintiff:

I live in Banks county. Am a farmer. Was on the train the night Mr. Powers was killed—on the down train. Was in the smoking car. What attracted my attention to Mr. Powers I heard him hollo; then I got up and walked to the platform between the cars. I just staid there. Don't think the train had stopped when I reached the platform. Never heard any signal given by the engine. Never heard either the whistle blow or the bell ring. I had all the opportunity that is required, I guess, for knowing whether the bell was rung or the whistle was blown. Think I would have heard either one. I never heard either. The train was moving at a pretty good speed. It is my recollection it was going faster than a man could walk.

Cross-examination:

100 I was in the car with Col. Wofford and my brother. I was just sitting in the smoking car. There was very little conversation amongst any of us. Don't recollect what we had been talking about. I know we were just sitting in there when we heard some one hollo. We were not paying particular attention to anything. I know the train we were on was moving. I got on the train at Amelia. Did not get out of the train. I only went out on the platform.

A. P. WOFFORD recalled for the plaintiff:

It was one or two minutes that my train was in there before the other train moved out. It was a very short time. I was standing on that side of the car of the train I was in when the other train passed by.

Cross-examination:

I mean the train going north. I do not know which train got to Lula first.

(Q. How long had it been since that engine had stopped before you got down?)

My recollection is it was only a few minutes—two or three minutes; something of that kind—not more.

Z. D. HARRISON sworn for the plaintiff:

I was at Lula the night Mr. Powers was killed. Was on the south-bound train. Don't remember the hour. The noise outside first attracted my attention to the fact that a man was hurt.

(Q. Did you make any observation? Did anything call your attention to any signals that were being given by the engine at the time?

Mr. Glenn objected to the question.)

Yes, sir; my attention was called to that—my recollection is that I did not hear any signals; that fact was stated at the time.

101 (By Mr. GLENN: I decidedly object to any such statement.

Well, the fact was remarked on. I did not hear any signals. I am a lawyer and clerk of the supreme court. (Who were with you at the time? Question objected to by Mr. Glenn. Objection sustained by the court.) My attention had not been called to the other train which had come in prior to the accident. I did not get out. I can only state my recollection of the accident as observed by me. Did not leave my seat in the car until after the accident, and then did not leave the car. My recollection is that the south-bound train, after stopping at the station, moved backward a few feet beyond there, but in a short time moved forward again, and we slowly moved forward, and as we did so no signal was given, but the train moved slowly along down towards the point where passengers usually land. About the time it arrived there a commotion in the front part of the car was noticeable and some noise outside was noticeable. Soon the fact was noised around some one had been hurt outside.

Cross-examination:

I was in the ladies' coach. There were three cars between me and the engine—the baggage car, express car, and second-class car. Perhaps there were four or five. I don't know how many. There were two or three cars between my car and the engine. It was at night, on the 11th of April. The doors and windows of my car were all shut and closed. Probably the door was open. While I was sitting in there waiting for the supper passengers the door probably
102 was shut. I don't know about that. I was not looking out for a signal. I paid no more attention to the signals when the train moved down that I ordinarily did. The accident excited inquiry in my mind at once as to what had taken place, and of course I reasoned upon its causes. That was after the accident. I knew of the accident the moment it happened. I think the bell could have been heard inside of the car.

T. G. SMITH sworn for the plaintiff:

I live in Banks county; am a farmer and also a merchant; was on the train the night Mr. Powers was killed—on the south-bound train. The first thing that attracted my attention to the accident I heard that man hollo out. At the time that man holloed out train was moving about six miles an hour; don't suppose a man could walk as fast as it was going. I did not hear any signals that the train gave; did not hear the bell ringing. It looks like I could have heard it from where I was standing. Nothing called my attention to the accident immediately after as to whether or not the bell was ringing.

Mrs. WESTBROOK recalled for the plaintiff:

My name is Elizabeth Westbrook. I live at McDonough. In April, 1886, my mother lived in Banks county. Her name was Louisa Stowe. She lived about thirteen miles from Harmony Grove. When I went to see her I would get on the McDonough train and go to Atlanta, and then take the air line to Lula to get to Harmony Grove. I visited my mother in April, 1886. It was on Sunday.
103 I came up from Atlanta on the morning train, about ten o'clock. I think I left Atlanta about four o'clock. There was some trouble about a little boy that was on the train. (What was that? Objected to by Mr. Glenn. By the court: Let the witness go on.) The boy got on in Atlanta and did not have the money to pay his fare. Don't recollect where he got off. Mr. Westbrook offered to pay his fare. He either got off or they put him off. I met Mr. Powers between Atlanta and Lula; I met him on the train. In getting off the train I got off the end towards Atlanta. Don't recollect whether it was the north or south end. Mr. Powers assisted me in getting off the train that night; he just took me by the hand and brought me down off the steps; my husband helped me also. We then went towards the hotel. Mr. Powers said he was going right across the way to the hotel. The first notice I had of the train coming they holloed, "Look out, missus, the train is coming." The train passed close by me; it just brushed me by. Did not see Mr. Powers or hear him at that time. Spent the night in Lula, at the hotel. Did not see Mr. Powers again that night. It was about eight o'clock when we reached Lula. Mr. Powers had a couple of satchels with him. Did not hear the engine ringing that night; did not hear the train coming down before they holloed to get out of the way. If the bell had been ringing I could have heard
104 it. Went to Harmony Grove the next day, on Monday. Did not go that night because there was no train. I have passed there several times before, but never stopped, on the occasion of going home to my mother's. Did not know Mr. Powers before I met him on that occasion. Got acquainted with him by his talking with the children. Did not notice whether there were any other ladies on that train; saw several other children besides my own. Don't remember which part of the car I was on. I left the train sort of to my left. The hotel was right in front of us when we got off the train. Never saw

the train at all. The hotel was a two-story building. As we walked down the steps of the car it was kind of slanting in front of us. Heard the train after it killed Mr. Powers. After that I went to the hotel.

Cross-examination:

It was dark when we got there. Maybe there were lights around there, but it was rather dark. There was a torch-light there on the left-hand side; don't know how big a light that was. That light was not between me and the hotel as we got off. I don't think it was between the hotel and the railroad. I dont think it was across the railroad from the hotel. I think it was on the left—I don't know where it was. I didn't see it until the next day. I know that the cars were there because I came in the cars and I know where they stopped; don't think that light was between the railroad and
105 the hotel; don't know how close I got to it. I got off of the car the end towards Atlanta. Mr. Powers got off first, then Mr. Westbrook, then I got off and took the children. If there was a track there that we had to cross I never saw it; don't recollect that we had to step down. I think it was a level piece; maybe we had to step across that track to go to the hotel. I never stopped from the time I got off the train to the time I got to the hotel. I was not looking for anything out of the way. I never saw the track, but the track was there all the same. It was about four or five minutes after I got off the car before I stepped on the place where the track must have been; don't know how long I was delayed in getting the children off; don't think Mr. Powers could have taken more than ten steps before he was struck by the engine. I suppose he had taken three or four steps when the engine came upon him, but I don't know this of my own knowledge. When we started to the hotel Mr. Powers was on the right of Mr. Westbrook. The children were on my left. We all started across the track. I know it was a track because I heard the train. I heard it as it passed me by; did not hear it before then. We all got away safe but Mr. Powers, and he was killed. The engine was coming from the side next to Atlanta. Everybody got off but Mr. Powers. I have been to Banks county several times, going to my mother's. I have
106 gone there by the Central road. I never saw Powers any more after they holloed—after I left the train. I never saw him any more after he picked up his baggage and started off. The train brushed me and came mighty near hitting me too; don't know that it hit Mr. Westbrook; don't know which side of the railroad the hotel is on. All this took place in the night; was there part of the next day. I got out of the car on the left-hand side. I can't be certain about that. I think it was the left-hand side. When we started to the hotel we all started together. I think I was looking out, but I knew nothing of this train that was coming. I never stopped to see after Mr. Powers. Mr. Westbrook was between me and Mr Powers. I answered some questions in McDonough before Commissioners Bryan and Reagan and I swore this: I was some three or four feet from Mr. Powers when we started to the hotel. He

(2.) I was standing between the two tracks upon which the R. & D. passenger trains run. The train came in upon the track furthest from the hotel; cross the main line or track nearest the hotel. Yes; the south-bound train from the north met the north-bound train from the south at Lula that night.

(3.) The south-bound train moved first after the two trains reached Lula. There were no signals given. Mr. Powers was hurt by the engine, which knocked him down and rolled him about 35 feet, and then threw him off and ran still about 75 feet.

(4.) Yes; there was a stop-post. It was moved further south next day. The train was running twice as fast as a man could walk. Mr. Powers was the man hurt, and the train ran about one hundred feet after striking him.

(5.) Mr. Powers died that night about two o'clock from the injury he received by the train.

Answers to Cross-Interrogatories.

(1.) I was standing between the two tracks upon which trains run. I did not see the train strike Mr. Powers.

(2.) The bell was not ringing, but the head-light was burning.

(3.) I did not see Mr. Powers attempt to cross the track.

111 J. F. SUTTON sworn for the plaintiff:

I live in McDonough; lived there in April, 1886. I know Mrs. Westbrook. I remember about the time Mr. Powers was killed in Lula. I remember Mrs. Westbrook living in McDonough at the time of this accident, in the spring of 1886. It was on a Sunday morning when she left. I should say it was on the next day or the day after that that I heard of Mr. Powers' death. It was a day or two after that I saw it in the Constitution. They were away from there about a week or ten days. I saw Mr. Westbrook on the evening he came back. I am no kin to Mrs. Westbrook.

Cross-examination:

I am not in business with Mr. Westbrook; am not connected with him in any way. I live right near him. I have a farm at McDonough. Mr. Westbrook was a shoemaker there. It is not my habit to watch people and their movements. I knew that he came there because I live near him. I did not say I was looking out for him. I do not keep memorandum of all I do unless it is necessary. I did not say what day of the week it was he came back. I said he left there on Sunday morning, and I got the news in the Constitution in a day or two afterwards; don't know whether or not there are warrants out for Mr. Westbrook there.

Testimony closed.

112 The court was requested by counsel for the defendant to charge the jury as follows: The undisputed fact exist in this case that the deceased man, Powers, being at the time about forty-five years of age, and, so far as the evidence discloses, in full posses-

sion of all his faculties, deliberately stepped upon the railroad track immediately in front of an engine which was running towards him at the rate of five or six miles an hour and not more than ten feet off, and was almost instantly run over and killed.

To say that this was an ordinarily careful act or that this conduct was not negligence on his part would do violence to a plain and well-settled principle of law. Admitting that he was a passenger, and therefore not bound, as a traveller on the highway approaching a crossing would be bound, to listen and to look both ways before attempting to cross the track, still the immediate presence within a few feet of a moving locomotive would, it seems to me, have awakened all the senses of an ordinarily careful man, and would have warned him in more ways than one that he ought not to put himself on the track right in front of it.

It cannot be doubted that this was a careless and dangerous step. If he had been ordinarily careful he would not have been killed or injured, even if the defendant was negligent. There is nothing in the other testimony in the case which relieves him from the consequences of this act of negligence. If he had not died
113 and had brought suit he could not have recovered, nor can these plaintiffs recover under these facts, and it is therefore your duty under the law to find a verdict for the defendant.

The foregoing request to charge was refused by the court; whereupon counsel for defendant requested that the court note an exception, which was thereupon done.

The court then charged the jury as follows:

Charge of the Court.

Gentlemen of the jury, unless the jury believe that the deceased occupied to the defendant the relation of passenger when struck by the engine, his children cannot recover. It would have been his duty clearly, if not a passenger, to look and listen before starting across the track, and, as by all the proof he did not do this, he could not recover unless he still occupied the relation of passenger. Unless he was a passenger, the railroad company only owed him the duty of ordinary care, and he would be required to exercise a greater degree of care, in the opinion of the court, than he would have been required to do if he had been a passenger, in that he ought to have both looked and listened for the trains, and if he had looked and listened for it, by doing so this accident would have been avoided, and if you believe that he did not occupy the relation of passenger to this railroad company, then you will bring in a verdict for the defendant.

114 The first question for you to decide is whether he occupied to the railroad company the relation of a passenger in this case and whether he left the train within a reasonable time after the train arrived at Lula. You will understand that the officers and agents of the road in charge of the business of the company at that point would have the right to suppose that the persons who were on that train and who were coming from the north-bound train

would leave it within a reasonable time, and would manage the affairs of the road with reference to that expectation on their part, and it is for you to decide also what is or what would constitute a reasonable time under all the circumstances and under the evidence laid before you. So that the question depends on this: that taking into consideration all of the circumstances of the case as to what you believe that the agents of the railroad company had a reasonable right to expect as to the time of passengers leaving the train and as to what passengers would and should do under ordinary circumstances in travelling, and, finally, as to whether or not Mr. Powers, the deceased, left the train and started across to the hotel within a reasonable time after the train arrived at Lula. If he did and if he started across the track within a reasonable time after the arrival of the train, then he occupied the relation of a passenger towards the defendant, and the railroad company owed to him the duty of extraordinary care and diligence as to his safety
115 while he was on the right of way or the premises of the defendant.

This duty of extraordinary care, so far as applicable to the evidence in this case, would require the defendant ordinarily not to run a train or locomotive across the track where it would suppose persons would have to go in passing from the train which they were leaving to the hotel spoken of in this case, and if it became necessary in the transaction of the business of the defendant to run a track across the passengerway from this north-bound train to the hotel, it should exercise extraordinary care and diligence in the moving of that train—the south-bound train—in this case with reference to the giving of signals of its approach, whistling or ringing its bell. In the opinion of the court, it should exercise this care, with reference to the speed at which the train was moving and also with reference to such lookouts as such extraordinary care would require, for the protection of persons who could be supposed to be passing across the track at the time.

The jury will be the judges of what extraordinary care and diligence would be in this case, judged by the circumstances of the case. This is the rule on the subject. Now, the jury will, in the first place, see whether or not you believe that the defendant's agents exercised this extraordinary degree of care in the moving of this train—the south-bound train—and if you believe that it did exercise
116 this extraordinary degree of care and should conclude that the defendant, by its agents, was not guilty of any negligence, then you will find for the defendant. This matter you will consider carefully.

If, however, you believe from the evidence brought before you that it, the defendant corporation, by its agents, failed to exercise this extraordinary degree of care, you would then proceed to consider whether or not the deceased himself was in the exercise of ordinary care and diligence at the time that this accident occurred. If the plaintiff, by the exercise of ordinary care and diligence on his part, could have avoided the accident or injury to himself, then he would not be entitled to recover in this case. The jury in deciding this

question as to the degree of care exercised by the deceased should take into consideration the rule that I have given them as to the duty of the defendant and what was to be rightly expected of it under all the circumstances, and that is to say the deceased had the right to expect, provided he was a passenger, that the way from the train to the hotel was safe, or that the defendant would provide such persons to look out or give notice or warning as such extraordinary care on its part would require.

The jury will bear these rules in mind and see whether or not you believe that the deceased was guilty of negligence himself to the extent that by the exercise of ordinary watchfulness or ordinary
117 care he could have avoided the injury to himself, and this, of course, relates to his stepping on the track at the time that the engine was approaching. Consider all of the evidence on this point; consider it and see what you believe about all of this; see how the train was approaching; whether the evidence shows that the bell was ringing or not; whether the head-light was burning; what about the speed of the train, and also about how he, the deceased, was himself acting; how he was walking, in what direction and what manner. Look at all the circumstances, and after reviewing all of the evidence on these points, see whether under the rules I have given you, and considering what was expected of the deceased under all the circumstances, whether he, by the exercise of ordinary care, could have avoided the accident. If he could have done so, he is not entitled to recover, and the jury should find for the defendant.

If the deceased was guilty of some negligence, but not to the extent that by the exercise of ordinary care he could have avoided the accident, and still, if in the opinion of the jury the defendant company was also guilty of negligence—that is to say, if you believe that the railroad company was guilty of negligence in the respects claimed by the plaintiff—then the jury ought to reduce the amount of the verdict they may find in proportion to the negligence attributable to each—that is to say, (illustrating it) if you believe that the deceased was guilty of the same amount of negligence as defendant, then the verdict or the amount you would otherwise have
118 given to these plaintiffs should be reduced by one-half or if three-fourths or one-fourth, then accordingly.

If the jury believe, under the rules I have given them, that the plaintiffs are entitled to recover, the next inquiry would be, How much are the plaintiffs entitled to recover? The court instructs you that these plaintiffs are entitled to recover to the value of the life of their father (the deceased), lest such amount as would be required for his own personal support during life—that is, you will see what he, the deceased, was capable of earning, & then see how much it would cost him to support himself during life. What he would earn less what he would spend on himself is the amount that his family would be entitled to recover. The plaintiffs' counsel has given you some figures in the course of his argument. This was proper enough as argument, but you need not take that as a guide; you will be controlled by the evidence. Adopt your own

views of what you think is right under the evidence. Some figures have been shown and some evidence has been given here as to what the deceased spent for his clothing during the year. I think it was fifty dollars per year. Some evidence has also been introduced as to the length of time the deceased spent at home to show how much his own support would cost. It is claimed
that his clothing and his board are the only items to
119 be deducted, but it seems to me there are other expenses
which a man would have, other expenses besides eating and clothes, and that is a matter for the jury to consider, to find out how much he spent on himself, how much it cost him to live. The jury must take a fair view of that—take into consideration what it would cost a man ordinarily to live and what he would expend upon himself out of a salary of one thousand dollars a year. Some tables have been offered in evidence. One shows the expectancy of life; the other shows what the value of an annuity for given amounts would be. It is stated that the deceased was forty-five years of age when he was killed. Now, opposite this number, 45, you will find another number, by which, if these tables are used, you would multiply the amount per annum you would determine upon for the purpose of arriving at the present value of such amount per annum. The jury are not required to use these tables; they may use them if they wish to do so; but if these tables are used it would be proper for the jury to consider other matters in connection with them. The jury also should consider the evidence of the business of the deceased. The evidence shows that he was a travelling man and that he worked upon a salary. The jury also consider the question as to whether or not as he became older he would be capable of travelling, and
whether or not when the infirmities of age came on he would
120 be able to do business and as to whether or not his capacity
to earn money would not lessen or cease entirely. The jury should take all these into consideration. The jury are not required to adopt any arbitrary rule at all. They should be governed by all the facts and circumstances of the case as brought before them, and you should use your own knowledge of such matters in human life as your own experiences and observation would lead you to believe should be considered. All these things should be considered in making up your verdict.

If the jury, after you have made the calculations you desire to make—if you decide that it would be proper to do so, you may, in your discretion, allow the children of the deceased interest from the time that he, the deceased, was killed, in April, 1886, down to the present time—that is, you may do this or not, as you think right.

If you find that the deceased was guilty of some negligence, but not to the extent that by the exercise of ordinary care he could have avoided the injury, as I have heretofore stated to you, you would then find for the plaintiff in such sum as would be right under the circumstances—that is to say, you would deduct from the amount of the sum you would otherwise find in proportion to what you believe to be the amount of the negligence that the deceased was himself

guilty of and by which he thereby contributed to his own
121 injury. The jury should give all the facts in the case a fair consideration—see what the facts are and then give to all the facts in the case a fair and impartial consideration—see what the truth is in each instance, then, having weighed these facts as given to you, carefully apply them as you find them to the rules of law given you.

If you find for the plaintiff, the form of your verdict would be: We, the jury, find for the plaintiff so much, in dollars.

If you find for the defendant, the form of your verdict would be: We, the jury, find for the defendant.

You may retire, gentlemen, and make your verdict.

The defendant excepts to the refusal of the court to make the charges as requested, and now excepts to the same and assigns the same as error.

I certify that the foregoing bill of exceptions is true and contains all the evidence material to a clear understanding of the errors complained of. The clerk of this court will enter the same of record and transmit the same, with a full transcript of the record in this case, to the next term of the Supreme court of the United States, in order that the errors complained of may be corrected.

The exception as to the refusal to charge hereinbefore con-
122 tained was duly made in open court during the trial of the above-stated case and was then and there noted by the court, and this certificate is given *nunc pro tunc* during the term of the court at which the trial was had and within sixty days from the date of the trial.

This January 28, 1889.

WM. T. NEWMAN,
United States Judge.

Filing.

Filed in clerk's office January 21, 1889.

A. E. BUCK, *Clerk.*

Supersedeas.

Circuit Court of the United States, Northern District of Georgia.

Whereas lately, in this court, in a cause between C. F. Reid, as next friend, plaintiff, and The Richmond & Danville Railroad Company, defendant, a verdict was rendered in favor of the said plaintiff for $9,800.00 on the 28th day of November, in the year eighteen hundred and eighty-eight, to wit, on the 28th day of the same month judgment was rendered by the court for the amount aforesaid, and the aforesaid defendant, with sufficient security, has this day filed his bond in error, approved by the Hon. William T. Newman,
123 the judge presiding in said court, so as to operate as a supersedeas, and the said defendant having sued out a writ of error in due form and time and a citation having been regularly taken and served upon the plaintiff and duly returned; therefore, on

consideration of the premises, it is here ordered by this court that a supersedeas be allowed and the judgment aforesaid suspended, pending the hearing of this cause on writ of error to the Supreme Court of the United States, and that no execution or other process of the enforcement of the same until said cause shall have been finally determined.

January 28, 1889.

WM. T. NEWMAN,
U. S. Judge.

Filing.

Filed in clerk's office 28 January, 1889.

A. E. BUCK, *Clk,*
By O. C. FULLER, *Dep. Clk.*

124 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between C. F. Reid, as next friend, plaintiff, and The Richmond & Danville Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Richmond & Danville Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

[SEAL.] Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

A. E. BUCK,
Clerk of the Circuit Court of the United States, Northern Dist. of Geo.

Allowed by—
WM. T. NEWMAN, *U. S. Judge.*

125 *Service Acknowledged.*

Service of a copy of the within is acknowledged and further service waived.

January 28, 1889.

HOKE SMITH,
Att'y for Pl'ff.

Filing.

Filed in clerk's office 28th day of January, 1889.

A. E. BUCK, *Cl'k,*
By O. C. FULLER, *Dep. Cl'k.*

126 Know all men by these presents that we, The Richmond & Danville Railroad Company, as principal, and A. E. Thornton, as security, are held and firmly bound unto C. F. Reid, as next friend, in the full and just sum of twenty thousand dollars, to be paid to the said C. F. Reid, next friend, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately at a session of the circuit court of the United States in and for the northern district of Georgia in a suit depending in said court between C. F. Reid, as next friend, plaintiff, & The Richmond and Danville Railroad Company, defendant, a judgment was rendered against the said The Richmond & Danville Railroad Company, and the said The Richmond & Danville Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said C. F. Reid, as next friend, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Richmond & Danville Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if *he* fail to make *his* plea good, then the above obligation to be void; else to remain in full force and virtue.

THE RICHMOND & DANVILLE R. R. Co., [SEAL.]
By its att'y at law & in fact, JNO. T. GLENN. [SEAL.]
A. E. THORNTON. [SEAL.]

Sealed and delivered in presence of—
H. C. HAMILTON,
Cl'k U. S. D. C.

Approved by—
WM. T. NEWMAN, *U. S. Judge.*

Filed in clerk's office 28 day of Jan'y, 1889.
A. E. BUCK, *Clerk*,
By O. C. FULLER,
Deputy Clerk.

127 The United States of America to C. F. Reid, as next friend, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Georgia, wherein The Richmond & Danville Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the verdict & judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William T. Newman, judge of the district court of the United States, presiding in and holding the circuit court of the United States for the northern district of Georgia, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

WM. T. NEWMAN,
U. S. Judge.

128 *Service Acknowledged.*

Service of a copy of the within citation is acknowledged and further service waived.
January 28, 1889.

HOKE SMITH,
Att'y for Pl'ff.

Filing.

Filed in clerk's office 28 day of January, 1889.
A. E. BUCK, *Clerk*,
By O. C. FULLER, *Dep. Cl'k.*

129 UNITED STATES OF AMERICA, } ss:
Northern District of Ga., }

I, A. E. Buck, clerk of the United States circuit court in and for the northern district of Georgia, do hereby certify that the foregoing printing and writing is a true, full, correct, and complete transcript of all the proceedings on file and remaining of record in my office in the matter of C. F. Reed, next friend of Maggie L. Powers, Homer

N. Powers, and Lula N. Powers, *vs.* The Richmond and Danville Railroad Company.

Seal U S. Circuit Court, N. D. Georgia.

In testimony whereof I hereunto set my hand and seal of the said circuit court, at Atlanta, Ga., this the 16th day of August, A. D. 1889.

A. E. BUCK, *Clerk.*

Endorsed on cover: Case No. 13,794. N. Georgia C. C. U. S. No. 200. The Richmond & Danville Railroad Company, plaintiff in error, *vs.* Maggie L. Powers, Homer W. Powers, and Lula W. Powers, by their next friend and guardian *ad litem*, C. F. Reed. Filed October 17, 1889.

149543

Office Supreme Court U. S.
FILED.
MAR 30 1893
JAMES H. McKENNEY,
CLERK.

No. 200.

Supreme Court of the United States,

October Term, 1892.

THE RICHMOND & DANVILLE RAILROAD CO.,
Plaintiff in Error,

vs.

MAGGIE L. POWERS *et al.*, BY NEXT FRIEND,
Defendant in Error.

BRIEF.

JACKSON & JACKSON, T. J. LEFTWICH,
Counsel for Plaintiff in Error.

FRANKLIN PUBLISHING HOUSE,
Atlanta, Ga.
1893.

THE RICHMOND AND DANVILLE RAILROAD CO., Plaintiff in Error, *vs.* Maggie L. Powers, Homer W. Powers and Lula W. Powers, by their next friend and guardian, *ad litem*, C. F. Reed.	Term No. 200. Case No. 13,794. In Supreme Court of the United States, October Term, 1892.

BRIEF OF PLAINTIFF IN ERROR.

This action arose out of the personal injuries claimed to have been sustained by the deceased, W. D. Powers, which resulted in his death. The catastrophe occurred at the place in the State of Georgia known as Lula, upon the line of the Richmond and Danville Railroad Company. The deceased, Powers, on the 11th day of April, 1886, is alleged to have been a passenger on the Richmond and Danville Railway Company from Atlanta to the station above named. It is claimed that after the train upon which he was a passenger arrived at Lula, the deceased undertook to make his way from the car in which he had been carried to Lula to the hotel. To do this it was necessary for him to cross another track belonging to the plaintiff in error. It was at night, and though it was claimed that no sufficient light had been provided by the company at that point, the evidence preponderates largely in favor of the contention of the plaintiff in error that the premises were sufficiently lighted. The hotel was situated within a short distance of the train upon which the deceased was a passenger. The station known as Lula was at that time a meeting point for two trains of the Railway Company, one going north from Atlanta, upon which the deceased was a passenger, the other coming from the north on its way to

Atlanta. The evidence indicates that it was the usage and custom of the train from the north, under the rules of the company, to remain upon the track upon which the deceased met his death, north of the point where passengers on the north-bound train were accustomed to alight. The south-bound train, under the rules indicated, would then, after giving such reasonable opportunity to passengers to leave the north-bound train, pass southward along and over the track intervening between the hotel and the other train on its way south. The evidence is in conflict somewhat as to whether the head-light of this south-bound train was lighted at the time and place in question, but here again the evidence heavily preponderates in favor of the contention of the Railway Company. It is also in evidence by both parties that near the hotel there was a burning torch which gave sufficient light for all ordinary and practical purposes. It would seem further to be a fact that, whether in the company of others or alone, the deceased was perhaps the last person to leave the north-bound train on his way, presumably, to the hotel. He was, it appears, encumbered with more or less baggage, which he was carrying either in his hand or by shoulder-straps, after the manner of traveling salesmen, which occupation it appears the deceased followed.

The evidence is in conflict also upon the point as to whether the bell of the southbound engine was rung or other warning given; it was claimed that the southbound train ran along and over the portion of the track where the deceased met his death at an unusual and dangerous rate of speed, but here again the evidence preponderates the other way, and it would seem to be almost a physical impossibility for the southbound train to have acquired any great velocity within the short distance intervening between the place at which it was shown to have been standing and the place where the deceased was killed.

The railway company is further charged with negligence in that it failed to provide a safe egress for its passengers from its train and from its right of way.

The verdict of the jury awarded $9,800 to the plaintiffs.

The writ of error presents for the consideration of this court, a single clearly marked and distinct issue.

Does not the record clearly show that the deceased met his death as the result of his own reckless negligence and want of ordinary care and diligence?

It is conceded, of course, that if the deceased was a passenger, the plaintiff in error owed a higher degree of diligence than it would have owed to him had he been a stranger and not a passenger.

The question here presented arises upon the request of the railway company to direct the jury to return a verdict for the defendant, on the ground as above stated, that the killing was the result of the failure of the deceased to exercise ordinary care and diligence.

ASSIGNMENT OF ERROR.

The court, it is submitted, erred in refusing to charge as requested by the defendant Company, the plaintiff in error, as follows:

"The undisputed facts exist in this case that the deceased man, Powers, being at the time about forty-five years of age, and, so far as the evidence discloses, in full possession of all his faculties, deliberately stepped upon the railroad track immediately in front of an engine which was running towards him at the rate of five or six miles an hour and not more than ten feet off, and was almost instantly run over and killed.

"To say that this was an ordinarily careful act or that this conduct was not negligence on his part would do violence to a plain and well-settled principle of law. Admitting that he was a passenger, and therefore not bound, as

a traveler on a highway approaching a highway would be bound, to listen and look both ways before attempting to cross the track, still the immediate presence within a few feet of a moving locomotive would, it seems to me, have awakened all the senses of an ordinarily careful man, and would have warned him in more ways than one that he ought not to put himself on the track right in front of it.

"It cannot be doubted but that this was a careless and dangerous step. If he had been ordinarily careful he would not have been killed or injured, even if the defendant was negligent. There is nothing in the other testimony in the case which relieves him from the consequences of this act of negligence. If he had not died and had brought suit he could not have recovered, nor can these plaintiffs recover under these facts, and it is therefore your duty under the law to find a verdict for the defendant." See record pp. 63 and 63.

The foregoing request to charge was refused by the court; whereupon counsel for the defendant requested that the court note exception, which was thereupon done.

That the Court should have granted the request and so charged the jury seems to the plaintiff in error plain. "The court may withdraw a case from the jury and direct a verdict for the plaintiff or defendant, as the case may be, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it." Delaware, Lakawanna & W. R. R. *vs.* Converse. 139 U. S., p. 469.

"It would be an idle proceeding to submit the evidence to the jury when they could justly find only one way."

Northern Pennsylvania R. R. *vs.* Commercial Bank, 123, U. S., pp. 727 and 733.

In the case above cited in the 139 U. S., p. 469, the court holds:

"If the evidence was so conclusive against the defendant,

upon the question of its negligence, that the jury could not reasonably find to the contrary, it is competent for the court, within the doctrine of the cases above cited, to so instruct them, leaving the jury to determine the question of the plaintiff's negligence in respect to which the evidence was conflicting."

In Worthington, etc., Ry. Co. *vs.* McDade, 135 U. S., p. 554, which was a case of injuries to an employe, the court holds that the question of contributory negligence is a question for the jury *when the facts are in dispute.*

In Little *vs.* Hackett, 116 U. S., p. 366, the following elucidation of the principle governing in this class of cases occurs:

Says Mr. Justice Field, "That one cannot recover damages for injuries, to the commission of which he has directly contributed, is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury or his omission of duties which, if performed, would have prevented it."

In the American & English Encyclopedia of Law will be found the following enunciation of the doctrine of contributory negligence:

"Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to that injury as an approximate cause thereof without which the injury would not have occurred." See Vol. 4, p. 17.

Says Mr. Beach, in his work on contributory negligence, section 51:

"This duty (*i. e.*, that of extraordinary care) on the part of the carrier is qualified by the reciprocal duty which is imposed upon the passenger. If the passenger's failure to

exercise ordinary care causes or contributes to the injury, such a failure is, upon familiar grounds, a bar to his action against the carrier."

In the well considered case of Casey *vs.* Canadian Pac. Ry. Co., 15th Ont. Rep., p. 57, also reported in American and English R. R. Cases, vol. 37, p. 172, which was a case strikingly similar to the one at bar, the court says:

"The defendant's station at A. was on what was known as the side track, between which and the main track there was a center platform for passengers alighting and getting on to trains on the main track. The plaintiff had come to the station to meet a friend, and was attempting to cross over the side track to reach the center platform, when the engine and tender which had been detached from the rest of the train and switched on to the side track, and were backing down to pick up a car some fifty yards distant, ran over and injured him. The plaintiff was looking in the opposite direction from that from which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out he must have seen them before he attempted to cross, and so could have avoided the accident, as it was only a second or two from the time he started to cross until he was struck, and there was no obstruction to his view. In an action for damages the jury having disagreed, *Held*, that the plaintiff's evidence having shown that the accident was caused by his own negligence and want of care, the defendants were not liable; and judgment was ordered to be entered for them.

See Doney *vs.* London and Southwestern Ry., 12th Q. B. Div., p. 70; also Dublin, etc. Ry. *vs.* Slattery, 3d A. PP. Cas. 1155 & 1166; Commissioners for Railways *vs.* Brown, 57th L., T., N S., p. 895.

In the case of Mayo *vs.* the Boston and Maine R. R., 104th Mass., p. 137, the court says:

"It is only when the whole evidence on which plaintiff's

case rests shows conclusively that he was careless that it is deemed to be the duty of the court to withdraw the case from the jury or to direct the verdict for the defendant."

Gahagan *vs.* B. & L. R. R., 1st Allen, p. 187; Butterfield *vs.* Western Ry. Co., 10th Allen, p. 532.

The case cited from the 104th Mass. was a case similar to this; the court there says:

"In the case now before us there is some evidence in the statements of Mrs. Mayo tending to show the exercise of due care by her, *and we perceive no distinct and unquestioned fact in her conduct*, either of acts or omissions, which will enable us to hold her to be precluded from presenting all the circumstances for the consideration of the jury, in order that the jury may pass upon that question.

"The conduct of Mrs. Mayo, as testified to by herself and others, must be weighed by a jury, to determine in fact whether she did use due care, both in attempting to cross at the time she did and in the manner in which she endeavored to accomplish the crossing. If she went upon the track where another train was to be expected at any time when she was unable to see whether it was approaching or not or without looking to see if the way was clear of danger, she did not use that reasonable precaution which everyone is bound to exercise for his own protection in said place. We are unable to see how the accident could have happened without some want of proper care on her part."

The court in this case declined to interfere, but only on the ground that there was a conflict in the evidence in respect to the question of due diligence. In the case at bar there is no conflict whatever, and this being so, the plaintiff in error contends the necessary inference of contributory negligence must be drawn.

The ruling of the court was:

"The mere fact that she began to cross at the time when her view along the track was obstructed by the departing train was an evidence that *she did not use due care.*"

Sonier *vs.* Boston, etc. Ry. Co., 141st Mass., p. 10; Elizabeth Gonzalez *vs.* N. Y. & Harlem River R. R., 38th N. Y., p. 440.

The last cited case was one involving an injury to a passenger occurring somewhat as that in the case at bar. The court says:

"A traveller approaching a railroad track is bound to use his eyes and ears so far as there is opportunity, and where, by such use of his senses, he might avoid danger, *notwithstanding the neglect to give signals or warning, his omission is concurring negligence, and should be so peremptorily declared by the court;* and when proof of this is clear, the plaintiff thus negligent should be nonsuited."

This case is clearly distinguishable from those where passengers have been injured in the attempt to alight.

Upon the point of the contributory negligence of the plaintiff below, we think that the record speaks for itself. There was neither looking nor listening shown on the part of the plaintiff, and the record clearly discloses the fact that had the deceased either looked or listened he would have been obliged to have seen the train which was approaching and which caused his death.

He either looked and listened or he did not look and listen; if he looked and listened, or either, the record clearly shows that he would have avoided the catastrophe, because his view of the train was wholly and entirely unobstructed. The inference, therefore, is clear, that his death resulted from his failure to exercise common and ordinary diligence at the time and place in question.

For these reasons it seems to us to be apparent from the record, that the death in question occurred, as the direct, legitimate and approximate result of the manifest recklessness and negligence of the deceased.

We respectfully submit the case and, on account of the errors assigned and above briefly discussed, ask for a reversal of the judgment of the circuit court.

Respectfully submitted.

JACKSON & JACKSON,
T. J. LEFTWICH,
Counsel for plaintiff in error.

HENRY JACKSON

149543

Office Supreme Court U. S.
FILED.
APR 5 1893
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

Term No., 200.

THE RICHMOND AND DANVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MAGGIE L. POWERS ET AL., BY NEXT FRIEND, DEFENDANTS IN ERROR.

Brief of Pope Barrow for the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

Term No., 200.

THE RICHMOND AND DANVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MAGGIE L. POWERS ET AL., BY NEXT FRIEND, DEFENDANTS IN ERROR.

Brief of Pope Barrow for the Plaintiff in Error.

STATEMENT OF THE CASE.

This was an action under the Georgia statute by the children of W. D. Powers for the homicide of their father. He was killed at Lula, a station on the line of the defendant's road in Georgia, April 11, 1886. Lula was a meeting point and supper-house for the north and south bound passenger trains. The south-bound generally arrived first, stopped in front of the supper-house, discharged its passengers, backed out of the way about five or six car lengths,

waited there until its passengers had time to finish supper; then pulled up again in front of the supper-house, received its passengers, and proceeded on its way southward. This was on the track on the right going south. The north-bound train came up on the side track, which is the track on the left going south and which is parallel with the one occupied by the south-bound train. The supper-house is some seventy or eighty yards from the right-hand track, so that the passengers from the north-bound train cross it in going from their train to the supper-house. The two tracks are about ten feet apart. The ground is level, the place open, and the view unobstructed in any direction. The usual course of things there transpired that evening. The south-bound ran in first, discharged its passengers and backed out of the way. The north-bound soon also ran in and discharged its passengers. Powers was a passenger on the north-bound, intending to stop over at Lula all night and take a train on another and a different road the next morning. He lingered behind the other passengers when his train stopped, waiting for the porter from the supper-house, which was also an hotel, to come over and assist him in carrying his luggage and sample cases, he being a traveling salesman for a commercial house. He was familiar with the place and with the movement of the trains, having frequently been there before. When he finally did get off his train he landed on the ground in the space between the two tracks. The track occupied by the south-bound train was between him and the hotel. He had to turn his face somewhat southward in heading toward the hotel, which was south of the point at which he disembarked. Having waited

behind the other passengers some time before starting out for the hotel, when he did land on the ground and started to cross the other track to go to the hotel the south-bound passengers were beginning to come out from supper and the south-bound train was pulling up to its place to receive them. It was coming up behind Powers and a little to his right, and was moving at the rate of five or six miles an hour. It had started from a standstill about five car-lengths back and had accumulated only sufficient velocity to enable it to move properly up to its place in front of the supper-house. There is a conflict in the testimony as to the ringing of the bell. The head-light was burning; Powers was walking along the strip of yard between the two tracks and gradually approaching the one on which the south-bound engine was moving. When the engine was within about ten feet or less of him he stepped upon the track in front of it. Employés of the railroad company and bystanders called out to him to look out. He paid no attention to them or to the engine, and before he had taken more than three or four steps on the track—before he had reached the center of the track, crossing it diagonally, as he was—the engine struck him, pushed him over on the left side of the track—the same side he had entered it from—rolled him over and over and injured him so that he died that night at two o'clock. The accident occurred about eight o'clock in the evening. He was about forty-five years of age, of average intelligence, accustomed to traveling and to that place, and in the full possession of all his faculties.

SPECIFICATION OF ERROR.

The court erred in refusing to give the following instructions to the jury requested by counsel for the defendant:

"The undisputed fact exists in this case that the deceased man, Powers, being at the time about forty-five years of age, and, so far as the evidence discloses, in full possession of all his faculties, deliberately stepped upon the railroad track immediately in front of an engine which was running towards him at the rate of five or six miles an hour and not more than ten feet off, and was almost instantly run over and killed.

"To say that this was an ordinarily careful act or that this conduct was not negligence on his part would do violence to a plain and well-settled principle of law. Admitting that he was a passenger, and therefore not bound, as a traveler on the highway approaching a crossing would be bound, to listen and to look both ways before attempting to cross the track, still the immediate presence within a few feet of a moving locomotive would, it seems to me, have awakened all the senses of an ordinarily careful man, and would have warned him in more ways than one that he ought not to put himself on the track right in front of it.

"It cannot be doubted that this was a careless and dangerous step. If he had been ordinarily careful he would not have been killed or injured, even if the defendant was negligent. There is nothing in the other testimony in the case which relieves him from the consequences of this act of negligence. If he had not died and had brought suit he could not have recovered, nor can these plaintiffs recover under these facts, and it is therefore your duty under the law to find a verdict for the defendant."

The evidence shows that nothing unusual, improper, or unnecessary was done by the defendant. The trains were handled in the usual way, which was the safest and best way to deal with the common occurrence of two passenger trains meeting at a supper-house.

D. P. Chandler's testimony, pages 36, 37, 38.

H. D. Spinks' testimony, pages 38, 39, 40.

C. L. Spinks' testimony, page 41.

A. W. Altman's testimony, pages 41, 42, 43, 44.

C. W. Asbury's testimony, page 44.

The engine was not moving more than five or six miles an hour. (Page 39, tenth line from top; page 58, fifth line, plaintiff's witness.)

Z. D. Hanison's testimony, a witness for plaintiff, page 57, says: It "moved slowly along."

Wofford, another of plaintiff's witnesses, says five or six. (Page 55, near bottom.)

R. H. Munday was speaking of the speed of the train when it first came in. His testimony does not relate to the speed at which it was moving at the time of the accident. It had stopped, backed, stopped, and then pulled up again since it "first came in," which was when he saw it. (Page 60, bottom of the page.)

Mr. Smith says it was "going slow." (Page 54.)

J. B. Dunlap (page 49, at fifth line from bottom.)

The head-light was burning. (See testimony of G. R. Farmer, a witness for the plaintiff, on page 62, in his answers to cross-interrogatories.)

Another of plaintiff's witnesses, J. C. McDonald, on page 61, testifies to the head-light in his answers to cross-interrogatories.

Another of plaintiff's witnesses, Charles O. Hening, on page 60, says he thinks the head-light was burning.

Alarms were given. The plaintiff's main witnesses, the two Westbrooks, repeatedly swore to the alarms being given. (Page 58.) Mrs. Westbrook says they said, "Look out, missus, the train is coming." Also at top of page 60.

See, also, plaintiff's witness, A. B. Westbrook, at middle of page 33. Also warned by another servant of defendant. (Page 43; side page 74.)

W. B. New, one of the defendant's employés, gave him warning. (Page 47, fourteenth line from top; page 42, at side page 71.) But conceding that the defendant was negligent, the plaintiff himself so far contributed to the injuries that but for his negligence he would not have been injured at all. By the exercise of ordinary care he could have avoided the consequences.

The Georgia statute says that if the plaintiff by the exercise of ordinary care could have avoided the consequences of the defendant's negligence and fails to exercise such care he cannot recover.

Code of 1882, § 2972, 73 Ga., 163.

Powers lingered after the other north-bound passengers had disembarked and gone over to the hotel. (See plaintiff's witness Hening, on page 60, at side page 108.)

R. C. Smith, testimony, says "delayed." (Page 54, ninth line from bottom.)

Mrs. A. B. Smith (page 53) says Powers waited until all were out (fourteenth line from bottom).

J. D. Nurn, on page 52, at side page 92, says he seemed to be waiting for the porter—"waited about five minutes" after he got out on the ground.

He told Alman he was waiting for the porter from the hotel. (Page 43, thirteenth line from top.)

He stepped upon the track right in front of the engine. (Page 42, third line below side page 71.)

Stepped on the track about ten feet in front of the engine. (Dunlap's testimony, page 48, tenth line from bottom.)

Nurn says about four feet in front of the engine. (Page 52, eighteenth line from bottom.)

Mrs. Smith's testimony. (Page 53, seventh line from bottom.)

Was right in front of the engine, says W. B. New, on page 47, eleventh line from top.

He had plenty of time to have gone across before the south-bound pulled up if he had not delayed. (Page 45, seventh line from bottom and tenth line from bottom.)

It was a clear bright night. (Page 53, second line from bottom.)

A man walking across that track had to step down four and a half inches. (Page 55, eighteenth line from top.)

Powers was familiar with the road. (Page 48, ninth line below side page 84.)

I respectfully submit that the unfortunate man was not ordinarily careful and there was nothing in the case for a jury.

Bancroft *vs.* B. & W. R. R. Co., 97 Mass., 275.
Walker *vs.* Midland R'y Co., 14 L. T. (N. S.), 796.
Lewis *vs.* London R'y Co., L. R. Q. B., 66.
Schofield *vs.* C. M. & St. Paul R. Co., 114 U. S., 615.
Central R. R. Co. *vs.* Harris, 76 Ga., 507, 508.
Atlanta R. R. Co. *vs.* Loftin, 86 Ga., 45.
A., P. & L. R. R. Co. *vs.* Luckie, 87 Ga., 7.

Respectfully submitted.

POPE. BARROW,
Of Counsel for the Plaintiff in Error.

149 U.S. 43

Office Supreme Court U. S.
FILED.
APR 1 1893
JAMES H. McKENNEY,
CLERK.

No. 200.

Supreme Court of the United States,

October Term, 1892.

THE RICHMOND & DANVILLE RAILROAD CO.,
Plaintiff in Error,

v.

MAGGIE L. POWERS *et al.*, BY NEXT FRIEND,
Defendant in Error.

BRIEF.

HOKE SMITH,
Counsel for Defendant in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

Supreme Court of the United States.

OCTOBER TERM, 1892.

RICHMOND & DANVILLE R.R. CO.

v.

POWERS ET AL.

No. 200.

Brief for Defendant in Error.

STATEMENT OF ISSUE.

This action was brought by the wife of W. D. Powers, deceased, against the railroad company. The wife died and the children of the deceased were made parties.

The fact that the Georgia statute allows the wife to bring suit for the death of her husband, and, in case of the death of the wife, provides that the children proceed with the action, is not questioned.

The deceased was a passenger on the Richmond & Danville railroad. He reached Lula, the place where he was to leave the train, and while going from the train to the hotel was run over and killed by an engine pulling another train for the same road.

The plaintiff and the defendant both introduced testimony, and after argument the defendant requested, among

other things, that the court instruct the jury to find for the defendant. This request will be found upon pages 62 and 63 of the printed record.

The only exception which the defendant made was to the failure of the court to give the charge as requested.

Facts.

While, of course, there was conflict in the testimony upon a number of different propositions, the plaintiff in the court below showed, by testimony, that the deceased bought his ticket from Atlanta to Lula, and became a passenger of the defendant; that the defendant stopped its train at Lula for passengers who would regularly leave the train and for passengers who wished supper to go from the train; that deceased while getting off of the train had his attention attracted to a man partly blind, who, with his wife, two children and a number of parcels, was endeavoring to leave the train; that no employee of the defendant gave any assistance to these persons who needed aid, and that deceased helped them from the train; that the end of the coach from which the party got off the train was some distance north of the pass-way from the train to the hotel, a distance of about one hundred feet; that it was necessary for those leaving the train at this point to walk down by the side of the train to the pass-way leading to the hotel; that deceased was just behind most of the passengers, or was following just back of the party he had helped off of the train in the direction provided by the defendant to reach the hotel; that the ground upon which he was walking had been smoothed up so that in the dark there was nothing to indicate the fact that the walk was over a railroad track; that the engine which had pulled his train into Lula was north of where he was walking; that an-

other engine from the same direction ran down upon him from his back and side while he was thus leaving the train; that the engine which ran upon him had nothing in front of it to notify deceased of its approach; that it gave no signal of its approach; that the fireman on the engine was not looking ahead to see whether passengers were still leaving the standing train; that the engineer was unable to see the track for a distance of sixty feet beyond the engine; and that this engine moved in the space provided for passengers to leave the standing train while deceased and other passengers were still leaving it without giving any signal of its approach; without having any one upon the engine who could see whether passengers were still on the track, and without having anything by the track to indicate to passengers that there was a track upon which they were walking.

A further fact developed that at the point where the accident happened there was no passenger shed or anything else to indicate to passengers the probability of the existence of a track on the place where they were required to walk to reach the pass-way across to the hotel.

Each one of these propositions were sustained by reliable testimony in behalf of the plaintiff.

See the testimony of—

A. B. Westbrook, page 32, printed record.
A. P. Woffard, " 55, " "
Z. D. Harrison, " 57, " "
T. G. Smith, " 58, " "
Mrs. Westbrook, " 58, " "
R. H. Mundy, " 60, " "
J. C. McDonald, " 61, " "
G. R. Farmer, " 61, " "
J. F. Sutton, " 62, " "
Charles O. Herring, " 60, " "

and many others introduced by the plaintiff.

In the evidence of H. D. Spinks, engineer, on page 39, will be found this statement:

"I could not see the rail right at the engine. Could not see it closer than eight or ten feet; could not see the left hand side that close; could see the left hand side about sixty feet off; fireman was not upon the seat looking out; nobody was looking out of his window. From where he was you could not see out hardly at all. It would take about sixty feet to see a man on the left hand side. The fireman could not have seen a man at all."

The detention was two or three minutes.

Argument.

In view of the facts stated, it seems hardly necessary to cite an authority or to present argument.

The courts have held over and over again that where a plaintiff has been injured under circumstances which justified his relying upon the opposite party for a position of safety, the injured person was under no duty to watch out for danger. In a case almost exactly similar to the present, the supreme court of Maryland held as follows:

"The passengers of the railroad are justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruption when passenger trains stop at a depot or station to receive or deliver passengers. Upon any other principle the lives of passengers may be most dangerously exposed in the hurry, noise, and confusion that generally attend a connecting station."

See 12th American and English R.R. Reports, 149 (B. & O. R.R. Co. *v.* Haines).

The case of Klein *v.* Jewett (26 N. J. Equity, 474) was that of a passenger struck by a train coming from

behind him when the passenger was seeking to reach another train. The court held :

" The petitioners in attempting to pass from the depot to the cars, in the absence of all warning of danger, had a right to regard themselves in a place of safety, where they might safely give their whole attention to the business in hand, and were not bound to be on the lookout for extraordinary perils created by the gross mismanagement of the persons in charge of the road."

The same case was again before the court and reported in 27th New Jersey Equity, 550, and was affirmed.

Warren *v.* The —— R.R. Co. (90 Mass. 227) was the case of a passenger who was crossing a track to take a train, and the rule laid down was similar to that above stated. See also—

100 Mass. 208, Gaynor *v.* O. C. R.R. Co. ;
104 Mass. 108, Chaffee *v.* The Boston & Lowell R.R. Co. ;
84 N. Y. 241, Brasswell *v.* The N. Y. Ry. Co.
78 N. Y. 338, Terry *v.* Jewett ;
Thompson on Carrier of Passengers, 233.

Jones *v.* E. T. V. & Ga. Ry. Co. (128 U. S. 443) is a case very similar to the one at bar. In it the court held that the facts were for the jury.

Damages.

There was no reason for bringing this case to the Supreme Court, but to obtain delay. The children have for years been deprived of their money. We urge the Court to place the penalty of damages upon the Company.